

INTERNATIONAL ACCIDENTS AND THE CHOICE OF LAW

A Thesis
Submitted in Fulfilment
of the Requirements for the Degree
of
Master of Laws
in the
University of Canterbury
by
S.M. Richardson

University of Canterbury
1982

CONTENTS

	Page
Abstract	i
Abbreviations	iii
Introduction	I
Part A Specific Solutions for International Accidents.	
1) Lex Fori	2
2) Lex Loci Delicti	8
3) The Traditional English Rule	14
4) Some Alternatives	40
Part B Specific Legislative Solutions	72
Part C Introduction	110
1) A Proposed Draft Bill	117
2) Application to Decided Cases	121
3) Summary and Conclusion	157
References	163
Table of Cases	171
Appendices	175

ABSTRACT

The choice of law dilemma for international accidents is the subject of this thesis. Part A contains an outline and discussion of the traditional judicial approaches adopted for torts in general in various epochs by a variety of jurisdictions. The *lex fori*, the *lex loci delicti* and a combination of both, which is the traditional English approach, are considered. A selection of modern academic alternatives to the traditional rules follows. In Part B some legislative solutions both actual and proposed, national and international are given.

It is the aim of the first two parts of the thesis to demonstrate that the law, especially in jurisdictions which follow the traditional English approach, is in an unsatisfactory state of flux. Whilst unification of the rules of private international law are seen as the ultimate goal, it is argued that there is a need for an immediate, albeit less ambitious, solution. Because of the dearth of judicial decisions in many jurisdictions it is suggested that legislation on a national basis be adopted. The aims of such legislation are considered and a proposed Draft Bill is presented in Part C.

The Draft Bill is applied to a sample of decided cases to illustrate that if implemented at a national level it would provide an immediate adequate solution for international accidents.

By way of conclusion a summary in diagramatical form compares the law applied in decided cases with both

the proposed Draft Bill and other legislative approaches discussed in Part B.

LIST OF ABBREVIATIONS:

A.	Atlantic Reporter (U.S.A.)
A.2d	Atlantic Reporter, Second Series (U.S.A.)
A.C.	Law Reports, Appeal Cases (England)
A.L.J.	Australian Law Journal
All E.R.	All England Law Reports
A.L.R.	Argus Law Reports (Australia)
Am.Bar. Assn. Jo.	The American Bar Association Journal
Am. J. Comp. Law	The American Journal of Comparative Law.
Am. J. Legal Hist.	The American Journal of Legal History
Am. U.L. Rev.	American University Law Review
Ark.L.R.	Arkansas Law Review
Bing N.C.	Bingham, New Cases, Common Pleas (England)
B.Y.B.I.L.	British Year Book of International Law
Calif. L.R.	California Law Review
Cal.Rptr.	California Reporter (U.S.A.)
Can. Bar. Rev.	Canadian Bar Review
Camb. L.J.	Cambridge Law Journal
Cass. Civ.	Cour de Cassation, Chambre Civile (France)
C.L.R.	Commonwealth Law Reports (Australia)
Clunet	Journal du droit international
C.A.	Court of Appeal
C.M.L.R.	Common Market Law Reports
Colum. L.R.	Columbia Law Review
Cornell L.R.	Cornell Law Review
Cowp.	Cowper, King's Bench Reports (England)
D.	Recueil Dalloz (France)
D.L.R.	Dominion Law Reports (Canada)
D.L.R. 2d.	Dominion Law Reports, Second Series, (Canada)
D.L.R. 3d.	Dominion Law Reports, Third Series, (Canada)
Dods.	Dodson, temp. Scott, Admiralty Reports (England)
Drake L.R.	Drake Law Review
Duke L.J.	Duke Law Journal
Duquesne L. Rev.	Duquesne Law Review
E.E.C.	European Economic Community

F.	Federal Reporter (U.S.A.)
F.2d.	Federal Reporter, Second Series, (U.S.A.)
F.L.R.	Federal Law Reports (Australia)
F. Supp.	Federal Supplement (U.S.A.)
Harv. L.R.	Harvard Law Review
H.L.	House of Lords
H. & N.	Hurlstone and Norman, Exchequer Reports (England)
H.M.S.O.	Her Majesty's Stationery Office
Hofstra L.R.	Hofstra Law Review
I.C.L.Q.	International and Comparative Law Quarterly
I.L.Q.	International Law Quarterly
Jo. of Air Law & Commerce	Journal of Air Law and Commerce
Jo. of Urban Law	Journal of Urban Law
K.B.	Law Reports, King's Bench (England)
Kentucky L.J.	Kentucky Law Journal
Law & Contemp. Probs.	Law and Contemporary Problems
L.Q.R.	Law Quarterly Review
McGill L.J.	McGill Law Journal
M.L.R.	Modern Law Review
Mich. L.R.	Michigan Law Review
Missouri L.R.	Missouri Law Review
N.E.	Northeastern Reporter (U.S.A.)
N.E. 2d	Northeastern Reporter, Second Series (U.S.A.)
N.S.W.L.R.	New South Wales Law Reports (Australia)
N.W.	Northwestern Reporter (U.S.A.)
N.Y.	New York Court of Appeals Reports (U.S.A.)
N.Y.2d.	New York Court of Appeals Reports, Second Series, (U.S.A.)
N.Y.S.	New York Supplement (U.S.A.)
N.Y.S. 2d.	New York Supplement, Second Series (U.S.A.)
N.Y.U.L. Rev.	New York University Law Review

N.Z.L.J.	New Zealand Law Journal
N.Z.L.R.	New Zealand Law Reports
N.Z.U.L.R.	New Zealand University Law Review
Okla. L.R.	Oklahoma Law Review
O.L.R.	Ontario Law Reports (Canada)
Ont. L.R.	Ontario Law Review
P.	Pacific Reporter (U.S.A.)
P.2d.	Pacific Reporter, Second Series (U.S.A.)
P.D.	Law Reports, Probate Division (England)
Q.B.	Law Reports, Queen's Bench (England)
Qd. R.	Queensland Reports (Australia)
Rev. Crit. d.i.p.	Revue Critique de droit international privé
Rutgers L.R.	Rutgers Law Review
Rutgers-Camden L.J.	Rutgers-Camden Law Journal
S.	Recueil Sirey (France)
S.A.S.R.	South Australian State Reports
S.C.	Quebec Reports, Superior Court (Canada)
S.C.	Session Cases (Scotland)
S.C.R.	Canadian Supreme Court Reports
S.E.	Southeastern Reporter (U.S.A.)
S.E. 2d.	Southeastern Reporter, Second Series (U.S.A.)
S.L.R.	Scottish Law Reporter
S.L.T.	Scots Law Times
So.	Southern Reporter (U.S.A.)
So. Calif. L.R.	Southern California Law Review
Sol. Jo.	Solicitors' Journal (England)
Stanford L.R.	Stanford Law Review
S.R.N.S.W.	State Reports New South Wales (Australia)
Sup. Ct.	Supreme Court
S.W.	Southwestern Reporter (U.S.A.)
S.W. 2d.	Southwestern Reporter, Second Series, (U.S.A.)
Swab	Swabey (Reports) (England)
Swan.	Swanston's Chancery Reports (England)
Syd. L.R.	Sydney Law Review
Texas L.R.	Texas Law Review
The Times	The Times Newspaper of London
Trib. Civ.	Tribunal Civil (France)
Tulane L.R.	Tulane Law Review

U.B.C.L.R.	University of British Columbia Law Review
U.C.L.A.L. Rev.	U.C.L.A. Law Review
Univ. of Penn.L.R.	University of Pennsylvania Law Review
Univ. of Tas.L.R.	University of Tasmania Law Review
Univ. of Tor.L.J.	University of Toronto Law Journal
U.S.	United States Supreme Court Reports
Univ.	University
USSR	Union of Soviet Socialist Republics
Virginia L.R.	Virginia Law Review
Vic. L.R.	Victoria Law Reports (Australia)
V.R.	Victoria Reports (Australia)
Wash.L. Rev.	Washington Law Review
Wayne L.R.	Wayne Law Review
W.L.R.	Weekly Law Reports (England)
W.W.R.	Western Weekly Reports (Canada)
Yale L.J.	Yale Law Journal

o-o-o-o

INTRODUCTION

The advent of the motor vehicle and the jet aircraft has led to a rapid increase in tortious situations containing an international element.

The problem is easily demonstrated. If A from one jurisdiction is involved in a motor vehicle accident with B from another jurisdiction and the accident takes place in a third jurisdiction, the question is which law is to determine the rights and liabilities of the parties concerned. In the above example, the problem is academic if the laws as applied to the facts are identical. However if the laws of the three jurisdictions differ the matter of which law to apply is of considerable practical importance. Various solutions¹⁾ for resolving the dilemma have been advanced and these are discussed in Parts A and B.

1) These solutions apply not just to international accidents but to all torts with an international element.

THE LEX FORI

"..The judicial tendency to apply the judges' own law has always been strong ... All over the world, judges are inclined to apply their own law wherever they can and this favor legis fori will always stand in the way of international harmony or uniformity and will therefore be obnoxious to an academic lawyer's desperate sense of tidiness.." 1)

To apply the lex fori to an international accident means that the domestic law of the forum is used to determine the issue. 2)

In the early stages of the development of private international law the lex fori played a dominant role in the solution of questions of tort liability. 3) In America for example it has been suggested that the lex fori was applied because the common law was assumed to be the same everywhere and the application of another law was never contemplated. Once such a possibility was realised the lex loci delicti gained ascendancy. 4)

-
- 1) O. Kahn Freund. The Growth of Internationalism in English Private International Law. p.13 (1960).
 - 2) "...the lex fori .. always means the domestic law of the forum i.e. (if the forum is England) English Law ..." J.H.C. Morris. The Conflict of Laws 2nd Edition (1980) p.9 (hereinafter cited as Morris). "the lex fori i.e. the local law of the place where the Court is situate.." Cheshire's Private International Law. 10th Edition p.3 (1979) (hereinafter cited as Cheshire). It can be argued that even when the forum adopts another law it is in fact the lex fori which is being applied. What is happening is that the judge is creating a law which is as nearly as possible similar to the foreign law which the foreign court would have applied had it been seized of the case. See Cheshire p.9 and see W.W. Cook. The Logical and Legal Basis of the Conflict of Laws 33 Yale L.J. 457 (1924).
 - 3) C.G.J. Morse. Torts in Private International Law (1978) p.5 (hereinafter cited as Morse).
 - 4) M. Hancock. Torts in the Conflict of Laws (1942) p.22 (hereinafter cited as Hancock)

In England where questions of jurisdiction and choice of law have traditionally intermingled the *lex fori* was applied as a result of the peculiarities of English procedural law in the seventeenth and eighteenth centuries.^{1) 2)}

In the twentieth century no jurisdiction applies the *lex fori* with total disregard for the foreign element - to do so would be to deny the very problem, however the *lex fori* is referred to for differing reasons.

It may be referred to in jurisdictions which adhere to the *lex loci delicti* rule (the place of wrong rule) on the grounds of public policy; the *lex fori* can be used as a jurisdictional prerequisite pending application of the *lex loci delicti* or the *lex fori* as the substantive law, and it may be used as a last resort, by default, when no state is interested in seeing its law applied, or as the proper law of the tort.³⁾

1) R.H. Graveson. Choice of Law and Choice of Jurisdiction in the English Conflict of Laws. 28 B.Y.B.I.L. 273 at p.289 (1951) notes that jurisdiction and choice of law are interrelated as the former is dependant on the latter which determines characterisation. ^e

2) Juries were chosen from the place where the cause of action arose. To overcome the difficulty of international elements it was possible to resort to a fiction whereby the plaintiff averred that the foreign place was a place in England which was subject to the Court's jurisdiction. Thus, for example, the plaintiff would allege that the facts occurred "in the city of Paris, in France" and then add "to wit in the parish of St. Mary le Bow in the Ward of Cheap". Hancock, p.5. See also Morse pp.8-9. ^{averred}

3) Discussed *infra* at p.41

Academic support for the lex fori has never been lacking. Early eminent conflicts scholars such as Wächter and Savigny held that the lex fori did and should govern tort liability¹⁾ and many modern writers also favour the lex fori approach.²⁾ The late Professor Ehrenzweig³⁾ for example contended that

"...Foreign law was applied in cases from time to time but the application of the lex fori has always been the basic principle of conflicts law..."

The advantages of applying the lex fori may be summarised as follows:

1. From a practical point of view its application is "...conducive to convenience, simplicity, efficiency and economy in the judicial process".⁴⁾ Judges and lawyers are trained and gain expertise in one particular jurisdiction; the intrusion of a foreign element almost always involves an encounter with the unfamiliar, and this can lead to complexity and consequently the risk of error is increased. Expert witnesses are required and

-
- 1) see 13 Am. J. Comp. Law 414 (1964) being a translation of Wächter's Archiv für die civilistische Praxis by Nadelmann and see Savigny's System des heutigen roemischen Rechts (1849) translated by Guthrie (1st Ed. 1869) and see Morse pp.5-7.
 - 2) A. Shapira, The Interest Approach to Choice of Law with Special Reference to Tort Problems (1977) (hereinafter cited as Shapira) lists at p.50 a "host of modern scholars" in favor of the prima facie applicability of the domestic law of the forum.
 - 3) A.A. Ehrenzweig, A Treatise on Conflict of Laws (1962) p.316. (hereinafter cited as Ehrenzweig).
 - 4) A Shapira, Manna for the Entire World or Thou Shalt Love Thy Neighbour as Thyself. Comment on Neumeier v. Kuehner. 1 Hofstra L.R. 168 at p171 (1973).

inevitably the cost of the case mounts.

2. To apply the *lex fori* enables the court to judge the case before it according to its notions of justice and reason.

"..It enables the English Courts to give judgment according to their own ideas of justice..."¹⁾

Against these two points it may be said:-

1. Both (1) and (2) reflect a parochial attitude, such views "...represent a total negation of any system of conflict of laws and shows a predilection for the sole application of English law..."²⁾

Other reasons commonly given for applying the *lex fori* are:-

1. As torts are like crimes the *lex fori* should apply. All agree that the application of foreign law is inapplicable in criminal cases, and by analogy the foreign law should not be applicable in tortious situations.³⁾
2. It has been suggested that tortious liability is closely connected with the public policy of the forum and should thus be determined by that law.⁴⁾

- 1) per Lord Pearson in Boys v. Chaplin [1971] A.C. 356 at p.406. Lord Wilberforce made the same point at pp.387-8 and both their Lordships made reference to the advantages of certainty and ease of application.
- 2) H. McGregor. The International Accident Problem 33 M.L.R.I at p.5 (1970).
3. Discussed by Morris p.244
4. Ibid.

Against these points it has been argued that:-

1. Tort law has long since broken away from criminal law and furthers very different objectives.¹⁾
2. Tort does not have any closer connection to the public policy of the forum than any other branch of the law.²⁾

Although having its supporters the lex fori is not without eminent critics. Morris³⁾ says

"..It (the lex fori) still has at least one supporter in the United States. But outside the British Commonwealth it has been abandoned nearly everywhere as impractical and unjust."⁴⁾

Disadvantages not already mentioned include:-

1. Forum shopping.⁵⁾ This is or could be encouraged by the application of the lex fori. Morris⁶⁾ points out that since the jurisdictional rules of the English Courts in actions in personam are very liberal the plaintiff may end up with a choice of forum; however it is possible that the prevalence and dangers of forum shopping have

1) Morris. p.244

2) Ibid

3) Ibid

4) Compare Ehrenzweig's views supra p.4 There would appear to be a conflict amongst some conflict scholars when considering the popularity or lack thereof of any given approach in any given epoch. Personal preferences possibly color the past.

5) Forum shopping is "the deliberate choice of a suitable forum in order to attract the application of a system of law favourable to the plaintiff's claim" Morris p. 245.

6) Ibid

been overstated.¹⁾

2. The application of the lex fori is unjust in that it assumes knowledge of the lex fori by foreign persons.

"...One of the basis rules of our legal system is that every person who appears before the Courts is conclusively presumed to know the law; this rule only extends to the lex fori. Not even the Judges are presumed to know foreign law; in fact such laws must be proved in each case, although there is a presumption that they are the same as the lex fori. Just as subjects of the forum are not presumed to know the content of foreign laws, the subjects of foreign states should not be presumed to know the content of the lex fori. In applying the lex fori as the lex causae in all cases, the forum will often apply a law to the acts of a person who did not know nor could be presumed to know, the rules of that law."²⁾

However it could be argued that this in practice does not put the foreign subject in a particularly adverse position, many torts, not just accidents, are unintentional and therefore not in the party or parties contemplation and the presumption as to knowledge of the law is a legal fiction and thus in practice the citizen of the forum and the foreign subject are really in the same position.

Robb³⁾ also argues that:

"...The inevitable consequence of applying the lex fori to all cases is that every person in the world - and all persons are potential defendants - must act in accordance with the laws of all common law jurisdictions. This task is impossible so its imposition on the defendant manifestly unjust.."

-
- 1) see for example R. Kramer. Interest and Policy Clashes in Conflict of Laws Vol.XIII Rutgers Law Review 523 at pp.560-61 (1959) and Shapira p.38-39.
 - 2) S.D. Robb. The Tort Rule of Private International Law. The Chimera Incarnate. 8 Syd. L. Rev. 146 at p.171 (1977)
 - 3) Ibid

Despite Ehrenzweig's views¹⁾ the lex fori has not had the support enjoyed by the lex loci delicti. Although used initially in the United States and from time to time applied in Continental Europe it is the Commonwealth, Japan and China that have favored the lex fori with the rest of the world adopting alternative solutions.²⁾

2. THE LEX LOCI DELICTI OR THE LEX LOCI DELICTI COMMISSI

To apply the lex loci delicti (or lex loci delicti commissi) means that the law of the place of the tort determines the issue.³⁾

Initially the lex loci delicti was evoked as a defence. In applying the lex fori the court allowed the defendant to refer to the lex loci delicti and if his acts were 'justified' by the lex loci delicti then the plaintiff failed. Blads³⁾ case is the earliest English example. Some English traders brought an action against Blad, a Dane for allegedly seizing their property in Iceland. The Privy Council held that Blad could avail himself of the provisions of the law in force in Iceland in so far as it afforded a justification for his act.

A hundred years later Lord Mansfield said in Mostyn v. Fabrigas⁴⁾

1) Ehrenzweig. supra p.4

2) Infra, at p.9 note 8 3) See Cheshire at p.259

4) (1674) 3 Swan 603

5) (1774) 1 Cowp.161

"..For whatever is a justification in the place where the thing is done ought to be a justification where the cause is tried.." ¹⁾

This view was adopted in the leading English case of Phillips v. Eyre ²⁾ and remains part of the English approach. ³⁾

Meanwhile in other jurisdictions ⁴⁾ the *lex loci delicti* came to be the sole determinant of liability. ⁵⁾

"The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum it gave rise to an obligation ... which follows the person and may be enforced wherever the person may be found..." ⁶⁾

and

"..It seems normal to start from this indisputable social fact that whatever occurs in a given territory is subject to the law in force in that territory ... (it is the law) which most naturally governs ..." ⁷⁾

By the 1930's the *lex loci delicti* was the prevailing approach throughout the world. ⁸⁾ As a concept it was explicable by reference to the now unpopular theory of territorial sovereignty. Its advantages may be

1) Ibid at p.175

2) (1870) L.R.6 Q.B.1

3) See infra

4) eg. Continental European countries, United States.

5) Subject usually to the public policy of the forum.

6) per Holmes J. in Slater v. Mexican National Rly. (1904) 193 U.S. 120 at p.126. This is the obligation or vested rights doctrine championed by Beale whose philosophy controlled the First American Restatement on Conflict of Laws in 1934.

7) J.P. Niboyet. Territoriality and Universal Recognition of Rules of Conflict of Laws. 65 Harv. L.Rp.582 (1952)

8) Except Commonwealth jurisdictions, China and Japan. E. Rabel. The Conflict of Laws A Comparative Study. Vol.II (1960) (Hereinafter cited as Rabel) lists the jurisdictions. p.235.

summarised as follows:

1. The lex loci delicti has an important interest in protecting and preserving its legal order. It has, for example, an interest in the standard of driving within its borders as this affects health and safety and is closely connected with social legislation.
2. Application of the lex loci delicti accords with the parties expectations. Those engaging in activities which involve some risk should be able to insure. Critics of the approach point out that many torts are unintentional and that the place of the tort may be fortuitous.¹⁾
3. One can also justify the lex loci on the grounds of certainty and that it produces uniformity of results. The very fact that the lex loci delicti rule "is simple and mechanical could provide decisions untainted by provincial bias and eliminate manipulation..."²⁾ It is arguable that no matter where the forum the end result be the same, rights and duties should not be substantially altered by a fortuitous choice of forum.

The main arguments against the lex loci delicti approach are that:-

1. It is fortuitous in many cases. However except in certain cases³⁾ it can be argued that it is no more

1) eg as in an air disaster. See J.A. Clarence-Smith. Torts in the Conflict of Laws. 20 M.L.R. 447 (1957)

2) F. Juenger. Choice of Law in Interstate Torts. 118 University of Pennsylvania L.R. 202 atp222 (1969)

3) Such as air and train disasters.

fortuitous than the *lex fori* might in fact be.

Some decisions will be arbitrary whatever approach is used because of the very nature of the problem.

2. To apply the *lex loci delicti* requires knowledge of the foreign law, expert witnesses must be called the case increases in complexity and becomes more costly.
3. Problems of *renvoi* can arise as the reference to the *lex loci delicti* is to the entire foreign law.¹⁾
4. The *lex loci delicti* approach presupposes a determination of the place where the wrong has been committed. Whilst cases involving facts located in more than one jurisdiction are the exception rather than the rule there has been considerable academic discussion²⁾ on the various 'solutions' to the problem. These solutions may be summarised as follows:-

a) The Place of Acting Theory

The great majority of European writers³⁾ define the place of wrong as that where the alleged tortious conduct was carried out by the defendant. It is argued that the actor is entitled to count on the laws of the state where he acts, as he has to obey those laws he should be entitled to their protection.

- 1) See *infra* p. 118 point I
- 2) For example Morse and Rabel both devote a chapter of their texts to the problem.
- 3) Rabel Vol.2 p. 304.

It can also be argued that the state where the defendant acts is interested in having its law applied to that act so as to protect the integrity of its legal order.¹⁾

Adherents of this theory argue that effects can occur in a plurality of states and thus the place of acting is preferable to the 'place of effect' theory.

b) The Place of Injury (Harm). The 'Last Event' Theory.

Under the traditional American rule the wrong is considered as being done where the injury takes place.²⁾ Thus paragraph 377 of the First Restatement of the Conflict of Laws states:-

"The place of wrong is the State where the last event necessary to make an actor liable for an alleged tort takes place."

Here it is argued that the plaintiff is entitled to rely on the law of the State where he is injured, that the theory is in keeping with the modern tort idea of compensating the victim rather than punishing the wrongdoer.³⁾ As with the place of acting theory, it is possible to argue that the State of injury has an interest in having its law applied.

1) See Morse p.113

2) See Rabel Vol.2 p. 301 et. seq. Morse 118 et seq.

3) Morse, p. 118.

c) An elective solution

Here the injured plaintiff may choose between the above two theories and the chosen law is applied in its entirety on the whole facts so as to determine all requirements of the cause of action and its effects.¹⁾ Whilst adopted by some European Courts²⁾ it has never been used by a common law jurisdiction.³⁾

d) The Place of the 'Substance of the Wrongdoing'

The gist of this approach is that the Court must have regard to "the substance of the wrongdoing" in arriving at its solution to the question of where the tort is committed.⁴⁾ The cases using this approach have arisen in the context of jurisdiction rather than choice of law. The argument here is that the answer to the question of the definition of the place of a tort can only be given in the light of the nature of the particular tort in question and cannot properly be resolved by resort to place of acting and place of harm theories.

Cases exist to support all four approaches and each 'solution' has its academic supporters. In the Commonwealth the weight of authority in negligence cases

1) Rabel Vol.2 pp.304-305. Morse 124 et seq.

2) Notably the German Reichsgericht and recently by the European Court of Justice in Case 21/76 Handelskwekerij G.J. Bier & Stichting Reinwater v. Mines de Potasse d'Alsace [1977] 1 C.M.L.R. 284

3) Morse, p. 127

4) Ibid

seemed to be on the side of the place of acting¹⁾ although most of the cases were concerned with jurisdiction rather than choice of law. Two recent decisions²⁾ however, suggest that

"The right approach is, when the tort is complete to look back over the series of events constituting it and ask the question: Where in substance did this cause of action arise?"³⁾ - "a more flexible, qualitative and quantitative test".⁴⁾

The most recent New Zealand decision⁵⁾ which again concerned jurisdiction supports this approach.⁶⁾

3. A COMBINATION OF THE LEX FORI AND THE LEX LOCI DELICTI OR THE TRADITIONAL ENGLISH RULE

"The Rule on the matter is very far from Satisfactory".⁷⁾

The commonly accepted starting point for a discussion of the traditional English approach to torts in the conflict of laws is Willes J. statement in Phillips v. Eyre⁸⁾ where he held that

1) e.g. George Munro Ltd. v. American Cyanamid & Chemical Corporation [1944] 1 K.B. 432; Anderson v. Nobel's Explosive Co. (1906) 12 O.L.R. 644; Abbott-Smith v. University of Toronto (1964) 45 D.L.R. 2d. p.672

2) Distillers Co. (Bio-Chemicals) Ltd. v. Thompson [1971] All E.R. 694 [1971] A.C. 458 and Moran v. Pyle National (Canada) Ltd. 43 D.L.R. 3d. 239 (1973)

3) [1971] 1 All E.R. 694 at p.700
[1971] A.C. 458 at p. 468

4) 43 D.L.R. 3d. 239 at p.250 (1973) per Dickson J.

5) My v. Toyota Motor Co. Ltd. [1977] 2 N.Z.L.R. 113

6) Ibid at p.117

7) Cheshire. p.263

8) (1870) L.R. 6 Q.B.1

"As a general rule in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England ... Secondly, the act must not have been justifiable by the law of the place where it was done."¹⁾

However differing interpretations, accorded both judicially and academically to Willes J. formula have created doubts and uncertainties, and in particular differences of opinion exist as to the meaning of specific words such as "actionable" and "justifiable" and secondly - whether the two limbs, tests or conditions relate to jurisdiction and/or choice of law.

i. Actionable if committed in England:

Two years before Phillips v. Eyre Lord Selwyn said in The Halley²⁾

"It is in their Lordships opinion alike contrary to principle and to authority to hold that an English Court of Justice will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

Willes J. used The Halley as authority for the first limb of his rule. The case involved a British steamship owned by a British Corporation which had allegedly damaged a Norwegian barque in Belguim waters whilst under the control of a compulsory pilot. Under Belguim law the owners would have been held liable. Whilst English law could excuse the owner as it had no control over the choice of pilot, Belguim law had an interest

1) Ibid at pp.28-29

2) (1868) L.R. 2 P.C. 193 at p.204

in seeing foreign ship owners pay for the damage done by their boats in Belgium waters. It was in this context that Lord Selwyn made his all embracing statement as to English law.

The only judicial criticism of The Halley appears to have been made in 1949 by Lord Keith in M'Elroy v. M'Allister.¹⁾ All other relevant cases accept or actively approve the decision.²⁾ Academic writers have, however, not been so kind. For example, Karsten³⁾ feels that "their Lordships approval of The Halley is quite the most regrettable feature of Boys v. Chaplin whilst Hancock⁴⁾ considers the dictum "gross" (although confined to its own facts and considered in the light of existing English law The Halley was correctly decided). Lorenzen⁵⁾ suggests that "the rule as laid down by the Privy Council in The Halley was far wider than was necessary for the decision and has isolated our jurisprudence from what is almost the unanimous rule of all civilised countries, with the exception of China and Japan." Robertson⁶⁾

-
- 1) (1949) S.C. 110 at pp.132-133.
 - 2) For example Boys v. Chaplin [1971] A.C. 356
 - 3) I.G.F. Karsten. Chaplin v. Boys: Another Analysis 19 I.C.L.Q. 35 at p. 45 (1970)
 - 4) M. Hancock. Torts Problems in Conflict of Laws Resolved by Statutory Construction: The Halley and other older Cases revisited. U. of Tor. L.J. 331 at p.340 and p.345 (1968).
 - 5) E.G. Lorenzen. Tort Liability and the Conflict of Laws 47 L.Q.R. 483 at p.499 (1931).
 - 6) A.H. Robertson. The Choice of Law for Tort Liability in the Conflict of Laws 4M.L.R. 27 at p.32 (1940)

suggests "...The conflict of laws would be a sterile science and a poor instrument of justice unless a right or remedy is given in situations where neither would be available pursuant to municipal law."¹⁾

Cheshire²⁾ asks "why such a tenderness ... should be shown so generously to the defendant in a case of tort when it is withheld in other branches of the law."

On the actual meaning of "actionable" Dicey & Morris Rule 178(1)(a) states:

"As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort..."³⁾

Hancock⁴⁾ takes the view that instead of the actual act being a tort in both countries the requirement is that that kind of liability exists in the forum.

"...the plaintiff must show that English internal law recognises an actionable tort of the same character, but he need not necessarily show that English law would impose liability in the identical circumstances of the particular case ..." ⁵⁾

He is very much against rule 178(1)(a) which

"envisages a suppositious transplanting of the operative facts of the case to the soil of the forum in order to consider what would have been their legal effect had that been their original location."⁶⁾

1) See also H.E. Read. What should be the law in Canada Governing Conflict of Laws in Tort? Canadian Legal Studies 1 (1968) 277 at p.280.

2) Cheshire p.267

3) Dicey & Morris. The Conflict of Laws. 9th Ed. p.938 (hereinafter cited as Dicey & Morris)

4) M. Hancock. Torts in the Conflict of Laws the First Rule in Phillips v. Eyre 3 U. of Tor. L.J. 400 (1940)

5) Ibid p.407

6) Ibid p.400

However, there would appear to be more judicial support for the former view since the publication of Hancock's article in 1940. In Anderson v. Eric Anderson (Radio & T.V.) Pty Ltd¹⁾ the forum was New South Wales where contributory negligence was a complete bar to a negligence claim; the accident occurred in the Australian Capital Territory where contributory negligence was a ground for apportioning damages. The appellant failed. Whilst an actionable tort in New South Wales, had the collision occurred there, the appellant would have met with the defence of contributory negligence which would have been an effective bar to his claim. The majority of the judges held that "actionable" had a meaning akin to "give rise to a cause of action".²⁾

In M'Elroy v. M'Allister³⁾ the court held that actionability in the abstract was insufficient. In order to satisfy the first limb the widow had to show that the defendant's negligence would have been actionable had the accident occurred in Scotland. The Court of Session, by a majority dismissed the claim on the grounds that by Scots law the driver's negligence was not actionable at the suit of the widow, despite the fact that it would be actionable in the abstract.

1) (1965) 114 C.L.R. 20

2) Infra at p. 147

3) 1949 S.C. 110

Yntema¹⁾ suggests that "actionable" must be construed as "triable" or "cognisable".

Adherents of this view argue that the first limb relates to jurisdiction and not choice of law.

Morse²⁾ taking an opposing view, argues that Yntema's approach is unacceptable as Willes J. cited his authority as The Halley in which no question of jurisdiction was raised. Secondly Morse said both limbs must be satisfied before "a suit may be found" and he suggests that it is difficult to see how Willes J. could have meant an English Court to have jurisdiction if only the first limb was satisfied. It is a violation of Willes J. express words, Morse says, to say that the first condition relates to jurisdiction. Thirdly there was no reason why Willes J. would formulate a new jurisdictional rule for torts nor is there any evidence to indicate that he intended to do so.

Finally Morse notes that the only judicial support for the view that the first limb is jurisdictional (and the second choice of law) is Lord Diplock's dissenting judgment in the Court of Appeal in Chaplin v. Boys³⁾ and that the House of Lords in Boys v. Chaplin⁴⁾ and the majority of the High Court of Australia in Anderson's⁵⁾ case rejected the argument.

1) H.E. Yntema in a review of Prof J.D. Falconbridge Essays on the Conflict of Laws. 27Can.Bar Rev. 116 at p.119.

2) Morse, p.46

3) [1968] 2Q.B. 1 at pp 38-39

4) [1971] A.C. 356 at pp. 385-387

5) (1965) 114 C.L.R. 20 at pp.42-44

Other writers contending that the first limb is jurisdictional include Pearl¹⁾ Spence²⁾ Nygh³⁾ and Gerber⁴⁾ whilst Dicey & Morris⁵⁾ Cheshire⁶⁾ Webb and North⁷⁾ suggest otherwise.⁸⁾ Judicial support exists in the House of Lords in Boys v. Chaplin⁹⁾ for both views, as discussed below.

Whether jurisdictional and/or choice of law the first limb has, as Webb & North¹⁰⁾ note, "emerged unscathed" as a result of Boys v. Chaplin.¹¹⁾ Apart from criticism arising as a result of viewing the limb as jurisdictional and/or choice of law both academic writers and judges alike have attacked the rule for two principle reasons.

Firstly the limb may be criticised for being founded on insufficient authority. Dicey & Morris¹²⁾ note that there is far less authority than is commonly supposed for the first condition and Morris¹³⁾

-
- 1) D. Pearl. Case and Comment. Camb.L.J. 200 /1968/
 - 2) D. Spence. Conflict of Laws in Automobile Negligence Cases 27 Can. Bar. Rev. 661 at p. 662 (1949)
 - 3) P.E. Nygh. Boys v. Chaplin or the Maze of Malta 44 A.L.J. 160 /1970/
 - 4) P. Gerber. Tort Liability in the Conflict of Laws 40 A.L.J. 44 and 73 Esp. p.49 /1966/
 - 5) Dicey & Morris Ch. 33
 - 6) Cheshire. Ch. 10
 - 7) P.M. North & P.R.H. Webb. Foreign Torts and English Courts The effect of Chaplin v. Boys 19 I.C.L.Q. 24 (1970)
 - 8) Infra at pp.27 et.seq.
 - 9) /1971/ A.C. 356
 - 10) Webb & North op. cit., supra note 7 at p.26
 - 11) /1971/ A.C.356
 - 12) Dicey & Morris op. cit., supra note 5.
 - 13) Morris p. 248

suggests Lord Selwyn's statement in The Halley¹⁾ is simply not true; further Robertson²⁾ argues that of the two grounds suggested, that is principle and authority, "neither bears close scrutiny". Two cases were cited in The Halley, The Amelia³⁾ and Simpson v. Fogo,⁴⁾ the first concerned statutory interpretation and the latter the enforcement of foreign judgments. Robertson points out that The Nostra Signora de los Dolores⁵⁾ and The Zollverein⁶⁾ were totally disregarded. Webb & Brown⁷⁾ summarise these two cases which appear to lay down the simple rule that the rights and merits of the parties to an action in England upon a foreign tort would be governed by the law of the place where such rights and merits originated.

On the question of principle, Robertson⁸⁾ suggests The Halley is equally unconvincing and quotes Mr. Justice Cardozo's famous passage in Loucks v. Standard Oil Co.⁹⁾ "... we are not so

1) (1868) L.R. 2 P.C. 193

2) Robertson op. cit., supra at p.16 note 6 at p.30

3) 1 Moo.P.C. (N.S.) 484 (1863)

4) 1 H & M 195 (1863)

5) 1 Dodson, 290 (1813)

6) Swabey Adm 96 (1856)

7) P.R.H. Webb & D.J.L. Brown. Case Book on the Conflict of Laws (1960) p. 281.

8) Robertson. op.cit., supra note 2 at p. 32

9) 224 N.Y. 99, 110, at p. 111 (1918).

provincial as to say that every solution to a problem is wrong because we deal with it otherwise at home..."

This overlaps with the other main criticism of the first limb which is that by having the rule the plaintiff has two hurdles to cross and this can lead to injustice as well as being "parochial"¹⁾ "illiberal"²⁾ and possibly a reason for the lack of reported cases in common law countries.³⁾

However, as stated above, The Halley was unanimously approved by the House of Lords in Boys v. Chaplin albeit obiter and thus the first limb clearly continues to form part of the traditional approach.

ii) The Act must not have been justifiable by the law of the place where it was done: - The Second Limb

Cheshire⁴⁾ says that "justifiable" is a strange word to use in connection with conduct that has caused injury to another and it can result in a remedy being obtained where none would be available in the place of the wrong, Machado v. Fontes⁵⁾ being an obvious example. A libel was published in Brazil where criminal proceedings only were possible. The Court held the second limb satisfied.

1) per Lord Wilberforce Boys v. Chaplin [1971] A.C. 356 at p. 387

2) Lorenzen, op.cit. supra at p.16 note 5

3) Richards v. McLean [1973] 1 N.Z.L.R. 521 is the only reported New Zealand case to date.

4) Cheshire at p. 269

5) [1897] 2 Q.B. 231

Willes J. in using the word was echoing Lord Mansfield's words in Mostyn v. Fabrigas¹⁾ where he said "whatever is a justification in the place where the thing is done ought to be a justification where the cause is tried."

Willes J. appears to have based his second condition on three cases, Blads Case,²⁾ Blad v. Bamfield³⁾ and Dobree v. Napier⁴⁾ where it was appropriate to use the word "justifiable" rather than any other term. Furthermore it was natural for Willes J. to have used the word "justifiable" for the fact situation in Phillips v. Eyre itself. The defendant, a former Governor of Jamaica had had to quell a rebellion and in the course of restoring peace had allegedly arrested and falsely imprisoned Phillips. Later an Act of Indemnity was passed which had the effect of rendering lawful all the Governor's actions during the rebellion. Thus the word "justifiable" described the arrest much more accurately than "not actionable".

Difficulties arose when the word was used in subsequent cases and its meaning "tortured"⁵⁾ or

1) (1774) 1 Cowp. 161 at p. 165

2) 3 Swan 603 (1673)

3) 3 Swan 604 (1674)

4) 2 Bing. N.C. 781 (1836)

5) Robertson op. cit. supra at p.16 note 6 at p.38

or "strained".¹⁾ Yntema²⁾ suggests that there seems to have been a "muddleheaded conspiracy" to give meanings and interpretations which Willes J. language cannot in justice be made to bear. Willes J. language reflects historic doctrine and the conditions have been taken out of context.

In Machado v. Fontes³⁾ the second limb was satisfied where the act, a libel, gave rise to a criminal penalty only in Brazil (the place where it was published). Lopez J. said in the case that the act must be innocent for the defendant to have a good defence. Judicial and academic views have taken remarkably differing stands as to the correctness of the Machado v. Fontes interpretation of the second limb.

Cheshire⁴⁾ considers it to be "heretical", whilst Lorenzen⁵⁾ suggests that justice is what was actually achieved; he said "...if an English Court feels that a person who has committed a crime in Brazil should respond to damages to the plaintiff, without regard to nationality or residence of the parties, although he would not be so liable under Brazilian law, the writer for one would hesitate to brand the decision as

- 1) J.G. Foster 16 B.Y.B.I.L. 84 at p. 95 (1935)
Some Defects in the English Rules on Conflict of Laws.
- 2) Yntema, op.cit. supra at p.19 note 1 at p.121
- 3) [1897] 2 Q.B. 231 at p.233
- 4) Cheshire, p. 269
- 5) Lorenzen, op.cit. supra at p.16 note 5 at p.490

erroneous". He does however note that the arguments used in support of the conclusion "are not beyond criticism" however much the decision is justified.

Pollock¹⁾ thought it hard to see why either a Brazilian or an Englishman who publishes a libel in Brazil where no civil liability would be incurred should be liable when an action is brought against him in England.

Gutteridge²⁾ says "it would be a strange result if an Englishman who in a foreign country publishes a libel concerning another Englishman can thereby save his pocket from payment of damages".

Robertson³⁾ suggests the decision is inconsistent with the principle that the penal and criminal laws of one country are not enforced in another.

Hancock⁴⁾ says the decision is at "glaring variance" with the policy that a plaintiff should not be given an undue advantage by a fortunate choice of a forum.⁵⁾

1) F. Pollock (note) 13 L.Q.R. 233 (1897)

2) H.C. Gutteridge. A New Approach to Private International Law. 6 Camb. L.J. 16 (1938)

3) Robertson. op.cit. supra at p. 16. note 6 at p.63

4) M. Hancock. A Problem in Damages for Tort in the Conflict of Laws. 22 Can. Bar. Rev. 843 (1944)

5) See also Schmitthoff. Torts Committed Abroad 27 Can. Bar Rev. 816 (1949) and J.D. Falconbridge. Essays on the Conflict of Laws. p. 815 (2nd Ed.) (1954).

Later cases have both approved and disapproved the decision¹⁾ and in the leading English case of Boys v. Chaplin²⁾ Milmo J. at first instance and Lord Donovan in the House of Lords followed or approved the decision; Lord Denning and Diplock L.J. in the Court of Appeal and Lord Hodson, Lord Wilberforce (both expressly) and Lord Guest (implicitly) rejected Machado v. Fontes.

Apart from meaning "innocent" other interpretations have been given to "justifiable". Rheinstein³⁾ says, for example, that the act must not be "disapproved of" by the lex loci, and Morse⁴⁾ contends that the lex loci must attribute legal consequences of a civil nature to the act in question. In The Mary Moxham⁵⁾ James L.J. said that if the act is "lawful", "excusable" or "legitimised" by the lex loci the defendant will not be answerable.

- 1) e.g. disapproved in Scotland. See Naftalin v. London etc. R.Co. [1933] S.C. 259. and in Victoria in Varawa v. Howard Smith Co. [1910] Vic. L.R. 509 and in Canada in Walpole v. Canadian Railway Co. (1921) Sask. L.R. 75 but more often followed eg. see McLean v. Pettigrew [1945] 2 D.L.R. 65 and Martin v. Marmen [1969] 6 D.L.R. 77 (3rd Session)
- 2) [1968] 2 Q.B. 1; [1968] 1 All E.R. 283; [1968] 2 W.L.R. 328; 111 Sol.Jo. 968 C.A. ; affirmed sub nom Chaplin v. Boys, [1971] A.C. 356; [1969] 2 All E.R. 1085; [1969] 3 W.L.R. 322; 113 Sol. Jo. 608, H.L.
- 3) M. Rheinstein. The Place of Wrong: A Study in The Method of Case Law. 19 Tulane L.R. 4 at p. 23 (1944)
- 4) Morse, p. 55
- 5) (1876) 1 P.D. 107 (C.A.)

To conclude, Cheshire¹⁾ suggests that whilst "justifiable" might have been an apt word for use in Phillips v. Eyre itself, it does not follow that it should be used for laying down the broad doctrine applicable to torts in general.

Leaving aside the problem of determining the correct interpretation to be placed on the word "justifiable" the major concern is to determine whether the second limb refers to jurisdiction and/or choice of law. Machado v. Fontes²⁾ and Boys v. Chaplin³⁾ are perhaps the two most important cases here.

The former case suggests the first limb is a choice of law rule and that the only reference to the *lex loci delicti* is to establish that the act is "not innocent", in other words the second limb is jurisdictional. One can however argue that Boys v. Chaplin overruled Machado v. Fontes. The facts,⁴⁾ agreed before the trial were that Chaplin negligently driving in Malta injured Boys. Both were British Servicemen who, after the accident, returned to England. Chaplin had no defence. Under Maltese law Boys could receive £53 as special damages whilst English law allowed general

1) Cheshire, p. 269

2) [1897] 2 Q.B. 231

3) [1971] A.C. 356

4) Discussed in detail see *infra* at p. 137 et seq

damages for pain and suffering which were assessed in excess of £2,500. The question was which law, Maltese or English, was to determine the problem.

In the Court of Appeal, Lord Denning¹⁾ held both tests to be jurisdictional whilst Diplock²⁾ L.J. dissenting held the first limb to be jurisdictional and the second choice of law. Lord Upjohn³⁾ held that once the act was not justifiable by Maltese law, English law applied thus adhering to the view that the first limb is choice of law and the second jurisdictional.

In the House of Lords⁴⁾ some of the judgments are difficult to follow, Lord Hodson, for example, seems to hold that both tests were intended to be jurisdictional⁵⁾, Lord Donovan "entirely agreed" with Lord Upjohn and Lord Guest did not discuss the problem. Cheshire⁶⁾ suggests that Lord Donovan and Lord Guest both imply that Phillips v. Eyre is a matter of jurisdiction. Lord Wilberforce held that the first limb was not jurisdictional but a choice of law rule subject to civil liability between the actual parties in the *lex loci delicti*. Finally Lord Pearson's judgment suggests that he does not consider Phillips v. Eyre to relate to jurisdiction.

1) See supra at p.26 note 2

2) Ibid

3) Ibid

4) Ibid

5) See discussion by Cheshire p. 272 et seq. and see North & Webb op.cit. supra at p.20 note 7

6) Cheshire, p. 272

There would thus appear to be four possibilities open as to the jurisdiction/choice of law problem:

- a) First limb is a jurisdictional requirement, second limb relates to choice of law.
- b) Both limbs are jurisdictional;
- c) First limb is choice of law and the second limb jurisdictional;
- d) Both limbs are choice of law, a "double actionability".

- a) With regards the first possibility Yntema favours this view as noted above as does Lord Diplock¹⁾ in Boys v. Chaplin. However, Lord Wilberforce²⁾ and, according to His Lordship, Anderson's case³⁾ are against this interpretation. Morse⁴⁾ himself against Yntema's views, suggests all their Lordships in the House of Lords in Boys v. Chaplin "provide clear authority against the view".

It would seem that there is today little academic or judicial support for this interpretation of Phillips v. Eyre.

- b) There is however more support for the second interpretation. Spence⁵⁾ for example, finds support from passages in Willes J.⁶⁾ judgment.

"...The civil liability arising out of a wrong derives its birth from the law of the place,

1) [1968] 2 Q.B. 1 at pp.38-39

2) [1971] A.C. 356 at pp. 385-387

3) (1965) 114 C.L.R. 20

4) Morse, p. 47

5) Spence, op.cit. supra at p.20 note 2

6) (1870) L.R. 6 Q.B.1

and its character is determined by that law."

Thus, Spence says, Willes J. would have applied Jamaican law to determine liability had it been necessary, as it was the jurisdictional requirement of actionability in the forum had not been met and so the problem of a choice of law rule never became relevant.

Pearl¹⁾ and Gerber²⁾ also adopt this view and Windeyer J.³⁾ in Anderson's case said:-

"But when the two conditions are fulfilled - when the act is wrongful by the law of the forum and in the place where it occurred - what then?.. The case is one that the court will entertain but by which law is it to judge it?"

Windeyer J.⁴⁾ in Anderson's case also said:

"I take the first condition to mean that the acts a plaintiff alleges were done must be such that had they been done in the country of the forum, here N.S.W., they would have given him a good cause of action there against the defendant according to the lex loci, here the law of N.S.W. That a plaintiff had a good cause of action in this sense does not mean that no matter exists that would answer or defeat it."

Morse⁵⁾ believes that there would be little merit in allowing the plaintiff to succeed when applying the lex loci at the jurisdictional level and then have him fail when applying the lex loci at the later choice of law stage.

One can interpret Lord Guest and Lord Donovan in Boys v. Chaplin as giving support to this view.⁶⁾

1) Pearl. op.cit. supra at p. 20 note 1 at p.220

2) Gerber, op.cit. supra at p. 20 note 4 at p.44 et.seq.

3) (1965) 114 C.L.R. at p.41

4) Ibid at p.41

5) Morse, p.51

6) [1971] A.C. 356 at pp. 380-383.

Critics, on the other hand, include Morse¹⁾ who notes that this view imposes two "threshold hurdles" and is difficult to justify on policy grounds.²⁾ McClean³⁾ considers the view "heretical". Both writers take the view that if the proper law of the tort⁴⁾ is applied, then to require both limbs to be jurisdictional prerequisites would be the height of absurdity.⁵⁾ McClean⁶⁾ also notes that the proper law of the tort is sometimes seen as an alternative to Phillips v. Eyre and that it is impossible to imagine the proper law of the tort being a jurisdictional requirement.

Despite the attractiveness of viewing both limbs as jurisdictional prerequisites it is suggested that since Boys v. Chaplin it can no longer be the prevailing approach in England.

- c) The third approach has found favour in some Commonwealth jurisdictions; it has been adopted by Australian and Canadian Courts.

Nygh⁷⁾ discusses the Australian cases and concludes that the law in Australia is developing along different lines to England law and thus in effect emphasising that this approach is not the current English approach.

- d) English law would appear to be that both limbs are choice of law requirements. The judgments of

1) Morse, pp.48-50

2) Ibid

3) K.D. McClean. Torts in the Conflict of Laws 43 A.L.J. 185 (1969)

4) Infra at p.41

5) Morse, p.50

6) McClean, op.cit, note 3

7) P.E. Nygh. Boys v. Chaplin in the Antipodes 4 U.of Tas. L.R. 161.

Lord Wilberforce and Lord Pearson¹⁾ suggests this. Cheshire²⁾ after discussing the various judgments in Boys v. Chaplin concludes that "on balance" in England Phillips v. Eyre relates to choice of law. Dicey & Morris³⁾ agree as do Morse⁴⁾ and Karsten⁵⁾. Likewise North & Webb⁶⁾ see this as the "only tenable" view after Boys v. Chaplin. Assuming this to be the correct view the next problem is whether or not actionability by both the *lex loci delicti* and the *lex fori* resolves the issue of substantive law.

In Boys v. Chaplin⁷⁾ the judgments provide no clear answer. Cheshire⁸⁾ notes that there is support "on one basis or another" for applying the *lex fori* as the substantive law whilst Dicey & Morris⁹⁾ take the view that the opinions of Lord Hodson and Lord Wilberforce are destined to prevail, as they thus formulate their Rule 178(2) to read:

"But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties."

-
- 1) /1971/ A.C. 356 at pp.385-387 and p. 398
 - 2) Cheshire p. 273
 - 3) Dicey & Morris, p. 941
 - 4) Morse, Ch.4
 - 5) I.G.F. Karsten. Chaplin v. Boys: Another Analysis
19 I.C.L.Q. 35 (1970)
 - 6) North & Webb, op.cit. supra at p.20 note 7 at p.27
 - 7) /1971/ A.C.356
 - 8) Cheshire, p.276
 - 9) Dicey & Morris, p. 945

Clause 2 is modelled on Section 145 of the American Restatement (Second) Conflict of Laws. Support for a flexible approach can be traced back to Phillips v. Eyre where Willes J.¹⁾ prefaced his formula with "As a general rule ...". However other than stating that Lord Denning M.R. in Sayers v. International Drilling Co.²⁾ considered Lord Wilberforce and Lord Hodson's³⁾ views were destined to prevail no other reasons are given for the assumption by Dicey & Morris.

It was perhaps possible that Rule 178(2) was the wish of Professor Morris rather than the current state of the law.⁴⁾

However, since the 9th edition of Dicey & Morris the Court of Appeal in Church of Scientology of California v. Commissioner of Police for the Metropolis⁵⁾ has accepted that in Boys v. Chaplin a majority had laid down a rule of double actionability which was subject to a limited exception in appropriate cases on the basis of the views expressed by Lords Wilberforce and Hodson.

As this is the latest English statement, Lord Wilberforce's and Lord Hodson's judgments in Boys v. Chaplin⁶⁾ now assume greater significance.

Whilst accepting that as a general rule actionability

1) (1870) L.R. 6.Q.B.1

2) [1971] 1 W.L.R. 1176 and see The Times Oct.25, 1977.

3) Dicey & Morris, p.945 note 28

4) Discussed below, see infra at p.41

5) (1976) 120 Sol.Jo. 690

6) [1971] A.C. 356

is required under the *lex fori* and the *lex loci delicti* their Lordships saw room for flexibility and both were influenced by the draft of the Second Restatement. Section 145(1) of the American Restatement (second) Conflict of Laws holds:

"...the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which as to that issue has the most significant relationship to the occurrence and the parties..."

It would seem possible to frame an exception on the lines of the Second Restatement from the combined judgments of Lords Wilberforce and Hodson, however neither judge gave explicit instructions as to when the exception was to be applied. Lord Wilberforce¹⁾ said that the general rule must apply unless "clear and satisfying grounds are shown why" it should be departed from, and

"No purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction for different purposes with different pre-existing relationships, from the background of different legal systems."²⁾

and Lord Hodson held that "as a general rule" should be interpreted so as to leave some latitude in cases where it would be against public policy to admit or exclude claims.³⁾

It is regrettable that there has been no other

1) [1971] A.C. 356 at p.391

2) Ibid

3) Ibid at p. 378

significant English decisions since Boys v. Chaplin¹⁾. As mentioned earlier²⁾ this in itself suggests that in England the law favours to a marked degree the defendant and further that potential plaintiffs are possibly being advised against instituting proceedings in view of the enormity of their task. It seems strange that over a decade could pass in England without another important decision coming before the English Courts, when taking one branch of torts along, namely accidents, one considers the volume of vehicles, both tourist and commercial which have entered and left England annually since she became a member of the European Economic Community.³⁾

Likewise there appears to be no significant developments outside England. Canada continues to adhere faithfully to Machado v. Fontes⁴⁾ without having had the opportunity to consider Boys v. Chaplin at a suitably high level.

- 1) In Sayers v. International Drilling Co. [1971] 1.W.L.R. 1176 Lord Denning M.R. was of the opinion that the Proper Law of the Tort was the rule whilst in Church of Scientology of California v. Commissioner of Police for the Metropolis (1976) 120 Sol.Jo. 690 and The Times Oct 25, 1977 per Lord Denning M.R. the C.A. accepted that a majority of their Lordships in Boys v. Chaplin had enunciated a rule of double actionability which was subject to a limited exception in appropriate cases on the basis of the views expressed by Lords Hodson & Wilberforce.
- 2) Supra at p.22
- 3) In 1978 there were 12.6million visits by people from overseas to Britain of which 6.2million were made by residents of other European Economic Community countries. Britain 1980 p.223. For the same period 6,900 people were killed on British roads, 83,000 were seriously injured and 261,000 slightly injured, *ibid* p.295
- 4) [1897] 2 Q.B. 231

In La Van v. Danyluk¹⁾ the Supreme Court of British Columbia noted that Boys v. Chaplin had overruled Machado v. Fontes but Kirke Smith J. felt bound to follow McLean v. Pettigrew²⁾ which had been decided by the Supreme Court of Canada in 1945. Thus the Canadian view is that "justifiable" means "not innocent" and that the first limb of Phillips v. Eyre relates to choice of law whilst the second limb is jurisdictional.

Likewise in Scotland no significant development has taken place. Cases such as Naftalin v. London Midland & Scottish Rail Co.³⁾ and M'Elroy v. M'Allister⁴⁾ have not had a judicial airing at a high level since Boys v. Chaplin. Thus Machado v. Fontes⁵⁾ remains rejected and both limbs of Phillips v. Eyre pertain to choice of law, thus making recovery for a plaintiff particularly difficult.

In the latest Scottish case of Mitchell v. McCulloch⁶⁾ the Lord Ordinary (McDonald) would not allow a pursuer to recover for heads of damages allowable in the Bahamas (the *lex loci delicti*) but which by Scottish law were too remote. The *lex loci delicti* "should not create or extend a right not recognised by the forum".⁷⁾

1) (1970) 75 W.W.R. 500 and see *infra* at p.143 et.seq.

2) [1945] 2 D.L.R. 65

3) 1933 S.C. 259

4) 1949 S.C. 110

5) [1897] 2 Q.B. 231

6) 1976 S.L.T. 2

7) *Ibid* at p.5

As noted above the traditional approach in Australia following Koop v. Bebb¹⁾ and Anderson's case²⁾ is that both limbs of Phillips v. Eyre are jurisdictional with the lex fori determining liability. Nygh³⁾ argues that the law in Australia is developing along different lines to that of England. The first reported case after Boys v. Chaplin was Joss v. Snowball⁴⁾ and the impact of Boys v. Chaplin on it says Nygh⁵⁾, was "nil". However, the conflict point is not strongly argued. Similarly in Kemp v. Piper⁶⁾ the Court was not required to determine whether the extent of liability should be co-determined by the lex loci delicti or not. In Kolsky v. Mayne Nickless Ltd.⁷⁾ both limbs of Phillips v. Eyre were treated as jurisdictional and the lex fori as the substantive law, the Australian "heresy".⁸⁾ The possible effect of Boys v. Chaplin on the traditional Australian rule was however considered by the Court which concluded that their Lordships had arrived at the application of English law by such a variety of reasons that no grounds existed for departing from traditional Australian authorities. The Court felt that:-

1) (1951) 84 C.L.R. 629

2) (1965) 114 C.L.R. 20

3) Nygh, 4 U.Tas. L.R. 161 (1973)

4) [1970] 1 N.S.W.R. 426

5) Nygh, op.cit. supra note 3 at p.164

6) [1971] S.A.S.R. 25

7) [1970] 3 N.S.W.R. 511

8) McClean, op.cit. supra at p.31 note 3 at pp.183-185

"This introduction of the concept of flexibility is, as it appears to us, the real point of departure in Boys v. Chaplin." ¹⁾

In Warren v. Warren, ²⁾ Matthews J. gave unqualified support to Lord Wilberforce's judgment in Boys v. Chaplin but the following year in Schmidt v. Government Insurance Office of New South Wales ³⁾ the traditional Australian view was again in the fore and no reference to Boys v. Chaplin in the light of Warren v. Warren was made. Nygh's ⁴⁾ conclusion is, in effect, that Boys v. Chaplin has had virtually no impact in Australia.

In concluding this chapter, one may tentatively summarise the present English position as follows:-

1. The first limb of Phillips v. Eyre remains law and thus where the lex fori itself imposes no liability whatsoever upon the defendant he will not be liable.
2. Where the lex loci delicti imposes no liability whatsoever on the defendant then again he will not be liable.
3. Where the lex loci delicti has subsequently rendered the act justifiable or wholly innocent then the defendant will not be liable.
4. The act must have been such that had the conduct occurred in the lex fori it would have entitled the particular plaintiff to sue the particular defendant.
5. Both limbs of Phillips v. Eyre relate to choice of

1) (1970) 72 S.R. (N.S.W.) 437 at p. 449

2) [1972] Qd.R. 386

3) [1973] 1N.S.W.L.R. 59

4) Nygh. op.cit. supra at p. 37 note 3 at p.176

law. Both the *lex fori* and the *lex loci delicti* (double actionability) apply to determine liability. Whilst this is the general rule it may be departed from in circumstances yet to be determined.

6. 1 - 5 above illustrate the complexity of English law in this field. As the law stands at present in Phillips v. Eyre jurisdictions the only advice one could give a client is that uncertainty prevails and that all things considered to embark on litigation would be really rather hazardous. It is noteworthy that there are no reported New Zealand decisions directly on choice of law for accidents in particular or torts in general and very few in other Phillips v. Eyre jurisdictions. Before suggesting a tentative solution to this state of affairs, it is proposed to outline some other jurisdictions attempts at resolving the dilemma.

O-O-O

4. SOME ALTERNATIVES

"Too often the field of Conflicts appears to be a mental game with infinite complications, destitute of clarity and simplicity and without any certain rules.."1)

Alternatives to the *lex fori* and *lex loci delicti* approaches are of recent origin and have for the most part been developed in the United States. A notable exception however is the "Proper Law of a Tort" theory developed by Professor Morris in the early 1950's (and even this he developed whilst in America). The two most important approaches are those of Professors Currie and Cavers, these theories or approaches will be outlined along with some other tentative solutions. Whilst specific criticisms of each view are noted in their context the more fundamental or general criticisms of these recent approaches are reserved for the conclusion of the chapter.

The specific approaches discussed are as follows:-

- (i) The Proper Law of a Tort.
- (ii) Governmental Interest Analysis
- (iii) Caver's Principles of Preference
- (iv) The 'Contacts' or Centre of Gravity Approach
- (v) The Better Law Approach
- (vi) The Forum Centred or True Rules Approach
- (vii) The Comparative Impairment Approach
- (viii) The Functional Approach
- (ix) The Restatement (Second) of Conflict of Laws (1969)

1) J.P. Niboyet. Territoriality and Universal Recognition of Rules of Conflict of Laws. 65 Harv.L.R. 582 at p.586 (1952)

(i) 'The Proper Law of a Tort'

Morris' first published mention of the proper law is found in a comment on M'Elroy v. M'Allister in 1949¹⁾ that "appalling decision" which was reached through "equally appalling and arid logical channels"²⁾. It was not until 1950-51 as visiting Professor at Harvard University that he developed his concept of the 'proper law' of a tort which he defined as "the law which on policy grounds, seems to have the most significant connection with the chain of acts and consequences in the particular situation before us."³⁾ "...The gist of this (the proper law) theory is that, while in many, perhaps most, situations there would be no need to look beyond the place of wrong, we ought to have a conflict rule broad enough and flexible enough to take care of the exceptional situations as well as the more normal ones: otherwise the result will begin to offend our common sense.."4)

Morris suggested that his concept would provide flexibility and would enable different issues "...to be segregated and thus facilitate a more adequate analysis of the social factors involved."⁵⁾

-
- 1) 12 M.L.R. 248 (1949) and see The Proper Law of a Tort 64 Harv.L.R. 881
 - 2) R.D. Childres. Towards the Proper Law of the Tort Texas L.R. 336 at p.336 (1962)
 - 3) Morris op.cit. supra note 1 at p. 888
 - 4) Morris, p.259 (1st Ed. 1971)
 - 5) Ibid, pp.259-260

(ii) Governmental Interest Analysis.

Currie writing in 1963 said:-

"1. When a Court is asked to apply the Law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the Court should employ the ordinary processes of construction and interpretation.

2. If the Court finds that one state has an interest in the application of its policy in the circumstances of the case and the other state has none, it should apply the law of the only interested state.

3. If the Court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflicts.

4. If, upon reconsideration, the Court finds that a conflict between the legitimate interests of two states is unavoidable it should apply the law of the forum.

5. If the forum is disinterested, but an unavoidable conflict exists between the laws of the two other states, it should apply the law of the forum - until someone comes along with a better idea.

6. The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the Court should not attempt to improvise a solution sacrificing the legitimate interests of its own state but should leave to Congress, exercising its powers under the full faith and credit clause, the determination of which interest shall be required to yield".¹⁾

Currie in developing his Governmental Interest

Analysis distinguished between three types of conflicts;

a true conflict exists where two jurisdictions have

1) B. Currie. Comments on Babcock v. Jackson. A Recent Development in Conflict of Laws. 63 Columbia L.R. 1212 at pp.1242-1243 (1963) and see B. Currie Selected Essays on the Conflict of Laws (1963).

identifiable policies that would be furthered by the application of their respective laws. In a false conflict one state has no claim (or a spurious claim) for the application of its law and the other state has a legitimate claim whilst the third situation is the "unprovided for" case here "neither state cares what happens"¹⁾ or a disinterested forum is unable to choose between competing policies in which it has no stake.²⁾

Currie insists that the forum should resolve the conflicts because balancing the relative importance of competing state interests is not a judicial function, it "... is a political function of a very high order. This is a function that should not be committed to Courts in a democracy. It is a function that the Courts cannot perform effectively for they lack the necessary resources."³⁾

McDougal⁴⁾ suggests Currie's approach "is still less than fully helpful" and has 'parochial' characteristics - presumably a reference to the lex fori applying in a true conflict situation.

Sedler⁵⁾ has "reformulated" Currie's approach, firstly Sedler suggests that if the forum has a 'real interest' it applies forum law assuming this will not be fundamentally unfair to the other party. Secondly if the

1) B. Currie. op.cit. supra at p.42 note 1 at p.152

2) Ibid, see Ch.3 generally.

3) Ibid, p.182

4) L.L. McDougal. Choice of Law: Prologue to a Viable Interest Analysis Theory. 51 No.2 Tulane L.R. 207 at p.242 (1977)

5) R.A. Sedler. Choice of Law in Michigan: A Time to go Modern. 24 No.3 Wayne L.R. 829 at p.835 (1978)

other state and not the forum has a real interest that law is applied again assuming no fundamental unfairness. Thirdly "when neither state has a real interest in applying its law on the point in issue, the choice of law decision should be made with reference to the common policies reflected in the laws of the involved states."¹⁾

Writing in 1973, Sedler²⁾ suggested that Courts should decide conflicts problems on a case by case basis with reference to considerations of policy and fairness to the parties. He states that conflict cases, especially in the field of torts, tend to fall into certain fact law patterns, and that with stare decisis a body of conflict law will emerge.

Kramer³⁾ suggests that in order to determine whether it is a true or false conflict situation regard must be had to three types of interests; these are 'public at large' individual and group interests respectively. Ratner⁴⁾ on the other hand suggests three policy values to be taken into consideration in the conflict cases, namely the avoidance of internal policy stultification⁵⁾, "home protection" and "fulfilment of expectations".⁶⁾ Ratner cites Cipolla v. Shaposka⁷⁾ as illustrative of his second value where it was

1) Ibid pp.835-836

2) R.A. Sedler. Interstate Accidents and the Unprovided for case: Reflections on Neumeier v. Kuehner 1 Hofstra L.R. 125 at p.131 (1973) and elaborated in Vol.2 Rutgers-Camden L.J. (1970)

3) R. Kramer. Interest & Policy Clashes in Conflicts of Laws Vol XIII Rutgers L.R. 523 (1959)

4) L.G. Ratner. Choice of Law Interstate Analysis and Cost Contribution No.3 47 So.Calif.L.R. 817 at p.824 (1973/4)

5) Ibid at pp.826-827 6) Ibid

7) 439 Pa. 563, 267 A. 2d. 854 (1970)

said¹⁾"...it seems only fair to permit a defendant to rely on his home state's law when he is acting within that state..."

Westbrook²⁾ considers that viewed as a whole Professor Currie's approach is "basically a philosophy of surrender" which does not provide a complete answer. However, it does achieve greater certainty by referring the Court back to the forum than other approaches which require the court to choose between conflicting state interests.

(iii) The Principles of Preference Approach

Cavers has formulated 5 principles as guidelines for determining the choice of law problem. He says³⁾

"1. Where the liability laws of the state of injury set a higher standard of conduct or of financial protection against injury than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the standards and the protection applicable to the case, at least where the person injured is not so related to the person causing injury that the question should be relegated to the law governing their relationship.

2. Where the liability laws of the state in which the defendant acted and caused an injury set a lower standard of conduct than do the laws of the home state of the person suffering the injury, the laws of the state of conduct and injury should determine the standard of conduct applicable to the case, at least where the person injured is not so related to the person causing the injury that the question should be relegated to the law governing the relationship.

-
- 1) Ratner op.cit. supra at p.44 note 4 at pp.826-827
 - 2) J.E. Westbrook. A Survey & Evaluation of Competing Choice of Law Methodologies: The case for Eclecticism. 40 Missouri L.R. 407 at p.459 (1975)
 - 3) D.F. Cavers. The Choice-of-Law Process Ch.4 (1965)

"3. Where the state in which the defendant acted has established special controls, including the sanction of civil liability, over conduct of the kind in which the defendant is engaged when he caused a foreseeable injury to the plaintiff in another state, the plaintiff, though having no relationship to the defendant, should be accorded the benefit of the special standards of conduct, and of financial protection in the state of the defendant's conduct, even though the state of injury has imposed no such controls or sanctions.

4. Where the laws of a state in which a relationship has its seat has imposed a standard of conduct or of financial protection on one party to that relationship to the benefit of the other party which is higher than the like standard imposed by the state of injury, the law of the former state should determine the standards of conduct or of financial protection applicable to the case for the benefit of the party protected by that state's law.

5. Where the law of a state in which a relationship has its seat has imposed a standard of conduct or of financial protection on one party to that relationship for the benefit of the other party which was lower than the standard imposed by the state of injury, the law of the former state should determine the standards of conduct or of financial protection applicable to the case for the benefit of the party whose liability that state's law would deny or limit."

These principles are illustrative, "they do not form a system".¹⁾ For each principle Cavers gives at least one illustration, thus the first principle is illustrated by the following fact situation:-

- | | | | |
|-----|---|---|------------|
| (a) | plaintiff from | - | California |
| (b) | defendant from
(being the Deceased's
personal representative) | - | Arizona |
| (c) | Place of injury | - | California |
| (d) | Forum | - | Arizona |

In Arizona personal injury claims do not survive the tortfeasor whilst the reverse applies in California.

1) Ibid p. 136

- (e) Law applied - California as
- "...Californians should not be put in jeopardy in California simply because an Arizonian has come into California from a state whose laws provide a lower standard of financial protection than does California's ..."1)

Whilst for Principle II

- (a) Plaintiff from - New York
- (b) Defendant from - Massachusettes
- (c) Place of Injury - Massachusettes
- (d) Forum - New York

New York law - unlike Massachusettes provides no monetary ceiling on damages.

- (e) Law Applies - Massachusettes law as
- "...Inhabitants of Massachusettes should not be put in jeopardy of liability exceeding those which Massachusettes law creates simply because persons from states with higher standards of financial protection choose to visit there ..."2)

By way of variation if the defendant is also from New York (a Boys v. Chaplin situation) then it is a false conflict and the principle should not be evoked. New York law is applied on the reasoning that the defendant pays no more than he expects to and Massachusettes law is only concerned with the defendants liability not with payments to widows and the like.

Cavers realised that his principles were sufficiently novel for courts to be reluctant to apply them until they had received academic support. Since their formulation they have been applied and received judicial support

1) Ibid p.142

2) Ibid at pp.148-9

in the United States.¹⁾

(iv) The 'Contacts' or 'Centre-of-Gravity' Approach

Here the jurisdiction with the most 'contacts' prevails. The approach is illustrated by Lord Denning in Sayers v. International Drilling Co. where he said:-

"So far as the claim in tort is concerned, the accident took place in the territorial waters of Nigeria. But it took place on an Oil Drilling Rig owned and controlled by a Dutch company and manned by employees of that company. The Nigerians had nothing to do with the Rig. So, Nigeria is out. The injured man was English, but his fellow employees (who were negligent) may have been English or American or some other nationality. The only common bond between them was that they were employed by the Dutch company. So, Dutch is in. If I were asked to decide the proper law of the tort (apart from contract) I should have said it was Dutch law."²⁾

The approach is open to the criticism that it is mechanical and ignores the underlying policies in the laws allegedly in conflict.³⁾

(v) The "Better Law" Approach

In 1952 Cheatham and Reese identified nine factors

- 1) An example being Nuemeir v. Kuehner 31 N.Y.2d.121 286 N.E. 2d. 454 (1972) per Field C.J. discussed below, whilst also receiving academic criticism from scholars such as McDougal who consider Cavers principles to be "too broad". See McDougal op.cit. supra at p. 43 note 4 at p.248
- 2) /1971/ 1 W.L.R. 1176, /1971/ 3 All E.R. 163 at p.166
- 3) Nygh. Some thoughts on the Proper Law of a Tort 26 I.C.L.Q. 932 at pp.933-934 (1977)

relevant in determining which law should apply.¹⁾ Reese subsequently added a tenth²⁾ whilst Yntema³⁾ went on to list no less than seventeen considerations reducible to two primary groupings, namely security and comparative justice. However, it is Leflar's⁴⁾ 5 'choice-influencing considerations' which seem to have achieved the most popularity in the United States. The five considerations are:

- (a) which is the better law
- (b) the predictability of results
- (c) the maintenance of interstate and international order.
- (d) Simplification of the judicial task and
- (e) Advancement of the forum's governmental interests.

-
- 1) E.E. Cheatham & W.L.M. Reese. Choice of the Applicable Law. 53 Colum.L.R. 959 (1952) in order of importance they are (i) the needs of the interstate and international system; (ii) application of local law unless there is good reason for not doing so; (iii) effectuation of the purpose of the relevant local rule in determining a question of choice of law; (iv) certainty, predictability, uniformity of results; (v) protection of justified expectations; (vi) application of the law of the state of dominant interest; (vii) ease in determination of applicable law, convenience of the court; (viii) the fundamental policy underlying the broad local law field involved; and (ix) justice in the individual case.
 - 2) The court must follow the dictates of its own legislature, provided these dictates are constitutional. 28 Law & Contemporary Problems 679 atp682 (1963)
 - 3) Yntema. The Objectives of Private International Law 35 Can. Bar Rev. 721 at pp.734-5 (1957)
 - 4) R.A. Leflar. American Conflicts Law p. 245 (1968)

These considerations are not listed in order of importance and Leflar specifically limited the number of considerations to a manageable number which could be used as a practical basis for making decisions.

In a 'true conflict' the court presumably has still to determine which is the better law and this requires the making of value judgments and this can lead to a "mindless homeward trend"¹⁾ and should not be encouraged.²⁾ "The court is assuming powers which should be left to its states legislature if it applies another state's law because of a belief that it is superior to a forum statute..."³⁾

Nygh⁴⁾ suggests that this approach was tacitly applied in Boys v. Chaplin " ... no other reason could explain the fact that five law Lords arrived by three different methods of reasoning at the identical result..."⁵⁾ The reason was not articulated; in fact Lord Wilberforce specifically rejected the idea.⁶⁾ Certain American cases have however explicitly adopted the approach.⁷⁾

1) Nygh op.cit. supra at p. 48 note 3 at p.936

2) D.F. Cavers in Symposium on the Value of Principled Preferences. 49 Texas L.R. 221 at p.221 (1971)

3) J.E. Westbrook, op.cit. supra at p.45 note 2 at p.461

4) Nygh, op cit supra at note 1 at p.937

5) Ibid

6) [1971] A.C. 356 at p. 392

7) Uncritical acceptance is found in Wallis v. Mrs. Smith Pie Co. (261 Ark 622, 550 S.W. 2D 453 (1977)) (although it has been suggested that this is not a suitable case for the application of the consideration. See L.L. Hogue. Arkansas' New Choice of Law Rule for Interstate Torts. A critique of Wallis, Williams and the Better Rule of Law. 4 Washington Univ. Law Quarterly 713 at pp.717-8 (1978), and New Hampshire has decided to apply the law it deemed the "better" in such cases as Maguire v. Exeter Hampton Company 114 N.H. 589, 325 A 2d. 778 (1974))

McDougal¹⁾ notes that Leflar's factors are at "a high level of abstraction" which means courts will have to use an "inordinate amount of discretion" and this could lead to unpredictability. Morse²⁾ would seem to agree although, with precedents a body of case law could evolve and thus he says, certainty could be achieved.

(vi) The Forum Centred or True Rules Approach

Ehrenzweig champion of the lex fori looks at past decisions to see the "real" or "true reasons" for the application of a particular legal system. If no true rule was apparent then Ehrenzweig suggested that the lex fori govern unless on the policy grounds of the forum it should be displaced.³⁾

Ehrenzweig contended that American Conflict Law had developed true rules of choice in most of those situations in which parties can claim to have taken into account a specific law.

"What is thus left for the residuary lex fori are such liabilities as those of tort... as to which application of forum law cannot be said to defeat a party's justified expectations..."⁴⁾

1) McDougal, op.cit. supra at p.43 note 4 at p.249

2) Morse, p.264

3) A.A. Ehrenzweig. The Lex Fori: Basic Rule in the Conflict of Laws 58 Mich.L.R. 637 (1960) also Ehrenzweig , Ch.4 especially pp.352-3

4) A.A. Ehrenzweig. A Proper Law in a Proper Forum: A "Restatement" of the Lex Fori Approach. 18 Okla.L.R. 340 at p.352 (1965)

(vii) The Comparative Impairment Approach

Here, the court is asked to measure the comparative impairment of the policies of the two states if the law of the other state was applied. Baxter, an exponent of this view suggests that when a court determines which state's internal objectives will be least impaired it is doing something "... very different in kind from the weighing process often referred to by similar rubrics, but the two are often confused..."¹⁾ He suggests that the fact that "...super value judgments are separable from the comparative impairment principle is one of the cornerstones.." of the approach.²⁾

The approach was used in Bernhard v. Harrah's Club³⁾ where an accident occurred in California, the parties being both Californian. The defendant had been drinking at a Club in Nevada where civil liability could not be imposed on the server of alcohol to a drunk person. The California Supreme Court noted that both states had an interest in seeing its rule applied but applied the law of California as that state's interest would be seriously impaired if Nevada tavernkeepers could serve drunk Californians who were likely to motor home and cause accidents. Weintraub⁴⁾ points out that a Nevada Court

1) W.F. Baxter. Choice of Law & The Federal System 16 Stanford L.R. 1 at p.18 (1963)

2) Ibid

3) 16 Cal.3d. 313; 546 P 2d. 719; 128 Cal.Rptr.215 (1976)

4) R.J. Weintraub. The Future of Choice of Law for Torts: What Principles should be Preferred. 41 Law & Contemp. Probs. 146 at p.158

using the same approach could reach the opposite conclusion and suggests that "... unless supplemented by specific objective criteria 'comparative impairment' is unlikely to be a method that is cogent, feasible to administer and predictable."

(viii) The Functional Approach

Here the Court firstly ascertains which jurisdictions are concerned and then constructs a rule for each relevant jurisdiction. If these rules conflict then the next step is to determine whether or not one jurisdiction is predominantly concerned. A jurisdiction is predominantly concerned if analysis reveals that even though the domestic policies of the concerned jurisdictions are of relative equal weight, that of one jurisdiction in light of its relation to a multistate transaction far outweighs that of the other jurisdictions, or that one jurisdiction has a greater "aggregation of concerns"¹⁾ that do the other jurisdictions. Should there be no predominantly concerned jurisdiction then analysis may reveal that "the claims of one jurisdiction are so clearly superior" that it should be recognised.²⁾ In this situation the *lex fori* is applied if the forum is concerned and if the forum is neutral it applies the concerned jurisdiction whose law "most closely approximates" the law of the forum.³⁾

1) A.T. Von Mehren & D.T. Trautmann. *The Law of the Multistate Problem* pp.341-342 (1965)

2) *Ibid*, p.77

3) *Ibid*, pp.407-408

This approach was developed by Von Mehren and Trautmann; the former also considered the possibility of developing special substantive rules for multistate problems. These rules are not necessarily to be chosen from amongst the provisions of the conflicting domestic jurisdictions concerned. Von Mehren¹⁾ discusses three types of situations where such rules could be advantageously applied. For the first situation he envisages a fact situation where two legal orders are both sufficiently concerned so that both rules should be given effect to but the two laws do not lend themselves to cumulative application. Secondly are those situations which because of their multistate characteristics involve considerations which do not have particular significance in comparable domestic settings.²⁾ and thirdly come the true conflict situations³⁾. Von Mehren considers Neumeier v. Kuehner a true conflict situation with the law of New York "not having sufficient strength" to require its application to the situation and Ontario likewise refusing to apply its guest statute. The Ontario statute subordinates deterrance and compensation policies in favour of a policy against ungratitude and the desire to avoid collusion to the detriment of insurance companies. As the insurance company was a New York company only the

1) A.T. Von Mehren. Special Substantive Rules for Multistate Problems: Their role & Significance in Contemporary Choice of Law Methodology. 88 Harv.L.R. 347 (1974)

2) Ibid, p.358

3) Ibid, p.367

policy against ingratitude remains and so Ontario takes the view that deterrence and compensation should prevail.

"If this analysis is correct, Neumeier presents a true conflict, since each concerned jurisdiction would choose to apply the other's domestic rule.." ¹⁾ Von Mehren then applies a multistate solution which recognises the policies of both states, "...thus achieving harmony of decisions" ²⁾ he lets the guest recover one half of the damages suffered. ³⁾ ⁴⁾

Von Mehren admits that the legislature is not likely to be active in developing these rules and so their formulation would be left to the judiciary and here he notes the "traditional hesitancy" to accord law making functions to the courts and "the general reluctance of all contemporary societies to assign additional tasks of great complexity and difficulty to already over burdened courts." ⁵⁾ Cavers ⁶⁾ recognised "the logical alternative that a rule derived from none of the domestic laws in question should be fashioned for the case" but rejected the approach on the grounds that the judge would lack guidance and that further multiplication of the rules of substantive law is undesirable.

1) Von Mehren, *ibid* at p.368

2) *Ibid* at p.348

3) *Ibid* at p. 357

4) G.G. Hoff. Adjustment of Conflicting Rights. 38 Virginia L.R. 745 at 761 (1952) calls this approach the "adjustment method".

5) Von Mehren, *op.cit.* *supra* p.54 note 1 at p.357.

6) D.F. Cavers. A Critique of the Choice of Law Problem 47 Harv. L.R. 173 at p.193 (1933)

The difficulties attached to the functional approach are obvious and numerous - what criteria should be used to determine a predominantly concerned jurisdiction, when is a claim superior to name but two obvious difficulties.

- (ix) The Restatement (Second) of Conflict of Laws adopted by the American Law Institute in 1969

Paragraph 145:-

"1. The rights and liabilities of the parties to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship with the occurrence and the parties under the principles stated in (para.) 6.

2. Contacts to be taken into account in applying the principles of (para.) 6 to determine the law applicable to the issue include:

- (a) The place where the injury occurred,
- (b) The place where the conduct causing the injury occurred.
- (c) The domicile, residence, nationality, place of business of the parties, and
- (d) The place where the relationship, if any, between the parties is centred.

These contacts are to be evaluated according to their relative importance with respect to the particular issue."

Paragraph 6 provides as follows:-

"1. A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

2. Where there is no such directive, the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of results, and
- (g) ease in the determination and application of the law to be applied."

The Second Restatement in moving away from the *lex loci delicti* rule to the "most Significant Relationship" concept of Morris was not at the time a revolutionary step. Not only was there a volume of academic writing as outlined above, but judicial support for Morris and Cavers ideas had been present since the celebrated case of Babcock v. Jackson¹⁾ in 1963 where Fuld C.J. said²⁾

"Justice, fairness and the best practical result.. may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation."

Nearly a decade later, Fuld C.J. was to formulate 3 rules to cover motor vehicle accidents, these are discussed below.³⁾

The Second Restatement has come in for considerable academic criticism, Ehrenzweig⁴⁾ firstly pointed out that it is a widespread misconception that the Institute is an official agency and that especially in communist countries it has been seen as the principle source of American law, and he criticised the Second Restatement on the grounds of "vagueness"⁵⁾ and with "give it up formulas". Juenger notes that "...it is not much of a rule since it fails to offer a definition of the central word 'significant'..."⁶⁾

1) 12 N.Y. 2d. 473; 191, N.E. 2d. 279 (1973)

2) Ibid at p. 481

3) Infra at p. 67

4) A.A. Ehrenzweig. The Second Conflicts Restatement: A last Appeal for Its Withdrawal. 113 Univ.of Pen.L.R. 1230 at p.1232 (1965)

5) Ibid at p. 1242

6) F. Juenger. Choice of Law in Interstate Torts 118 Univ. of Pen. Law Review 202 at p.212 (1969)

Others consider it a "question begging formula"¹⁾ a "mere counting of geographical contacts"²⁾ and that it can lead to uncertainty as no criteria is given for assessing the relative importance of the choice of law principles in any given case.³⁾ Morse⁴⁾ does note however that uncertainty exists equally in the academic approaches and that this particular problem is to a degree mitigated by the attempt to state specific but not invariable rules for each tort; for example paragraph 146 which deals with personal injuries provides:-

"in an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship ... to the occurrence and the parties, in which event the local law of the other state will be applied."

McDougal⁵⁾ considers the Second Restatement a "disappointment" as only fragments of interest analysis were incorporated into paragraph 145 and to return to Ehrenzweig⁶⁾, "surely, it is neither feasible nor desirable to 'restate' a beginning".

A problem central to these approaches or rules⁷⁾ is that they lack certainty and predictability and can be

1) Cavers. op.cit. supra at p.45 note 3 at p.207

2) Morse, p. 260

3) Ibid

4) Ibid

5) McDougal, op.cit. supra at p. 43 note 4 at p.256

6) Ehrenzweig, op.cit. supra at p.57 note 4 at p.1244

7) For example Nygh op.cit. supra at p. 48 note 3 at p.939 says that a Principle of Preference is in effect a new Choice of Law Rule.

seen as being of little help to a court. One wonders if a court really would find assistance from Cheatham & Reese's nine relevant factors (or Yentema's seventeen considerations) and to resort to "the ordinary process of construction and interpretation"¹⁾ is surely of little assistance to a court faced with an international tort. To determine the policy behind a purely domestic law is a difficult task and at an international level almost impossible. In Commonwealth jurisdictions a court must adhere to the rules pertaining to interpretation of Statutes as recourse to legislative history for purposes of interpretation is not permissible.²⁾ Statutes generally completely ignore problems raised by foreign elements and this appears to be so not only in Commonwealth jurisdictions but in the United States as well.³⁾ Policy and the reason or reasons behind any given law often involve matters of degree and policy is invariably connected with the particular country or state's norms and values. Whilst the problem is perhaps not so great in the United States or Australia where there exists a common language and shared norms between the states there must surely be a tendency to view one's own laws as best and a strong temptation must exist to prefer ones

1) Currie. 63 Columbia L.R. 1212 at pp.1242-1244 (1963) and Selected Essays on the Conflict of Laws (1963)

2) However, Baade suggests that "...American Courts can look at Foreign legislative history even if the Courts of the relevant foreign country would not do so. He does however seem to be the only exponent of this view. See H.W. Baade. The Case of the Disinterested Two States Neumeier v. Kuehner 1 Hofstra L.R. 150 at pp.153-154 (1973)

3) Kramer. op.cit. supra at p.44 note 3 at p. 537

own policy to that of an alien country.

It is also hard to see how Federal Courts can develop any criteria for choosing rationally between clashing legitimate state policies in true conflict situations.

Uncertainty could also arise. Babcock v. Jackson¹⁾ and subsequent New York cases illustrate this. The Jacksons took Miss Babcock in their motor vehicle on a weekend trip to Canada. The journey started and was to end in New York where the parties lived and where the motor vehicle was garaged and presumably insured. Whilst in Ontario the car ran off the road and as a result Miss Babcock was seriously injured. The *lex loci delicti* did not allow recovery in this situation, the forum was New York and by New York law Miss Babcock could obtain damages. The New York Court of Appeal allowed Miss Babcock to recover as New York law had the most significant contacts with the matter, "...in sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.." ²⁾ Moreland³⁾ makes the point that as both the unlawful conduct (negligence) and the injury occurred in Ontario an Ontario Court faced with identical facts could very well decide that Ontario had the most significant relationship and apply its law. Thus different results

1) 12 N.Y.2d. 473; 191 N.E. 2d. 279; 240 N.Y.S. 2d.743

2) Ibid at p. 483, 284 and 750 respectively

3) Moreland. Conflict of Laws: Choice of Law in Torts
A Critique 56 Kentucky L.J. 5 at p.13 (1967/8)

could arise from the same set of facts depending on the choice of forum and this could lead to injustice and that other evil - forum shopping.

Ehrenzweig¹⁾ suggests it is no wonder that Courts eager to apply the new doctrine expounded by the New York Court in Babcock's Case have found themselves in "complete confusion" when two years after refusing to apply the Ontario guest statute the New York Court applied the Colorado guest statute in an action between two New Yorkers because of Colorado's prevailing interest, and then in the next year returning to the New York liability rule in another host-guest action arising out of an accident in Ontario.²⁾

A second and connected problem is that all the approaches mentioned would involve considerable time and expense to administer. Also the ordinary adversary system or two party litigation cannot fully and adequately inform the court of the scope and extent of the issues involved and as Bradley³⁾ notes, a court has no duty to apply interest analysis until a party requests it to do so, and even if a court undertakes a party-initiated

1) A.A. Ehrenzweig. False Conflicts & The Better Rule: Threat & Promise in Multistate Tort Law. 53 Virginia L.R. 847 at p.850 (1967)

2) Dym v. Gordon 16 N.Y. 2d. 120; 209 N.E. 2d. 792 262 N.Y.S. 2d. 463 (1965) and Macey v. Rozbicki 18 N.Y. 2d. 289; 221 N.E. 2d. 380; 274 N.Y.S. 2d. 591 (1966) respectively.

3. J.F. Bradley. After Hurtado & Bernhard; Interest Analysis and the Search for Consistent Theory for Choice of Law Cases. 29 Stanford L.R. 127 at p.141 (1976)

interest analysis it apparently has no duty to consider the interest of states whose laws are not advanced by the litigants.

Reese¹⁾ suggests that approaches generally have the defects of uncertainty, unpredictability and are time consuming to apply; prove an "onerous difficult and frustrating task"²⁾ for the judiciary and that "when the policy underlying a statute or decisional rule is otherwise ascertainable, it will often be difficult to refine the policy to the point of being able to determine whether it would or would not be furthered by the rules application in a case involving foreign facts..."³⁾ He suggests that approaches were developed as the existing rule (application of the *lex loci delicti* in the United States) was unsatisfactory. Unlike Sedler⁴⁾ Reese considers the field of torts in true conflict of laws to be vast but suggests that rules could and should emerge as in other areas of the common law. He considers that a large number of narrow rules⁵⁾ appealing to common sense⁶⁾ have the greatest chance of success.

Sedler⁷⁾ suggests that "...The Courts have misconceived the judicial function in conflicts cases. It is not necessary to adopt a "rule" for all cases, particularly not a comprehensive system of rules designed to solve all

1) W.L.M. Reese. Choice of Law: Rules or Approaches
57 No.3 Cornell L.R. 315 (1972)

2) Ibid at p. 317

3) Ibid

4) Supra at p.44

5) R.A. Sedler. 57 3 Cornell L.R. 315 at 325 (1972)

6) Ibid at p. 329

7) R.A. Sedler. *Babcock v. Jackson* in Kentucky.
56 Kentucky L.J. 27 at p.85 (1967/8)

conflicts problems that may arise. All that is necessary is to decide whether the law of the forum should be displaced in the particular fact-law pattern before it". The lex fori will be displaced when the legitimate expectations of the parties demand it; policy and fairness rather than abstract and analytical doctrine are to prevail.¹⁾

A third major difficulty would appear to be the classification of a given fact situation into a "false" "true" "no interest" or "disinterested forum" case. This can be illustrated by reference to Hurtado v. Superior Court²⁾ a 1974 decision of the Californian Supreme Court. The facts were simple and typical of international accidents. A Mexican died in California as a result of a motor vehicle accident. The defendants were Californians. The law of Mexico placed an upper limit of just under \$2,000 for compensation for wrongful death whilst California had no upper limit. The Californian Court applied Californian law having found it to be a "false conflict" situation.

Weintraub³⁾ however has no difficulty in analysing Hurtado as a "no interest" case. He says⁴⁾ that the classic "no interest" case is one in which the plaintiffs state has a law favourable to the defendant and the defendants state has a law favourable to the plaintiff.

1) Ibid at p.86

2) 11 Cal. 3d. 574; 522 P. 2d. 666; 114 Cal Rptr. 106 (1974) and see infra at p.130

3) Weintraub. op.cit. supra at p. 52 note 4

4) Ibid at p. 153

The term "no interest" comes from the argument that neither state is interested in having its own law apply. In *Hurtado* the plaintiffs state law (Mexico) is favourable to the defendants (Californian) as they can only be liable for \$2,000 and the defendant's state (California) has a law favourable to the plaintiff as the deceased Mexican's next of kin could get over \$2,000.

A court could also hold that it was a "no interest" situation by deciding that the object or policy behind the Mexican law was to prevent excessive financial burdens on Mexican defendants and as the particular defendants are Californians Mexico has no interest in the application of Mexican law. Here the Californian unlimited recovery rule must be seen as designed to protect Californian residents for the benefit of non residents; California will have no interest in its rule extending to Mexicans. Here the unlimited recovery rule would be seen as having nothing to do with deterrence.

Nygh¹⁾ writing in the same year as Weintraub discusses a situation where "neither (states) are interested in applying their policies to the particular case". This seems to be the same as Weintraub's definition of "no interest" cases above. Yet Nygh obviously aware of *Hurtado* type fact patterns considers such cases as "almost inconceivable".²⁾

The Court in *Hurtado* in deciding a "false conflict"

1) Nygh. op.cit. supra at p.48 note 3 at p.943

2) Ibid at p.945.

existed emphasised the deterrance aspect of the Californian law. California was viewed as having an interest in seeing its law applied as a deterrant to negligent conduct in general, whilst Mexico had no interest in preventing full liability. The Court also noted that Mexico's interest in compensating resident survivors would be furthered if Californian law was applied so both California and Mexico had an interest in applying Californian law.

Other writers have analysed the case as a false conflicts situation but by different reasoning. Ratner¹⁾ looks at the relative cost contribution. Californians, he says, have to pay for their unlimited recovery rule and this money comes from higher insurance premiums, higher transport costs and higher prices generally. The rule Ratner says is designed to protect Californian residents and also residents in other states which have an unlimited recovery rule because all such states have a reciprocal interest in unrestricted recovery by residents.

Mexicans on the other hand do not have to contribute to an expensive scheme and presumably would apply their rule to a Californian defendant sued in Mexico by a Mexican plaintiff. The visiting Mexican in Hurtado had not contributed to the Californian scheme prior to his death and his next of kin could not claim unequal protection because had Mexico had an unlimited recovery rule a Californian court would have allowed him

1) Ratner, op.cit. supra at p.44 note 4 at pp.829-841

or his next of kin unlimited recovery. "...So no constitutionally invidious distinction is thereby created between resident plaintiffs who can fully recover from resident defendants and non resident plaintiffs who cannot."¹⁾ Ratner concludes that a 'false' conflict exists "...the defendants state is the only state with an interest in the application of its rule, and that rule requires application of the plaintiffs state rule."²⁾ So Ratner would apply Mexican law.

Finally and without too much difficulty one can conceive of a court deciding Hurtado was a 'true conflict' situation with Californian law as a deterrant to negligent conduct in general. Mexico here would want to see Mexican law applied on the grounds of policy; it can be seen as an unjust windfall that the deceased Mexican's next of kin get more simply because their relation died across the border, and/or with the lower cost of living in Mexico \$2,000 would be considered as adequate compensation by Mexican standards.

Thus without too much difficulty a simple fact situation such as Hurtado v. Superior Court can be analysed as a false conflicts case with either Mexican or Californian law applying depending on how the Court reasoned. Secondly it could be treated as a true conflict situation or thirdly a "no interest" case, and the Court still has the task of determining the applicable law which

1) Ibid, at p.837

2) Ibid

again poses difficulties. If the Court decides it is a true conflict then it still has to, for example, work through Cavers five principles and apply the appropriate one.

Because of the difficulties attached to these approaches some academics and members of the judiciary have reverted to rules for solving certain fact situations. In Neumeier v. Keuhner¹⁾ for example, Fuld C.J. developed three rules for motor vehicle accidents involving more than one state. He suggested that:

"1 When the guest-passenger and the host-driver are domiciled in the same state, the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guests.

2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not - in the absence of special circumstances - be permitted to interpose the law of his state as a defense.

3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants."

However in Labree v. Major²⁾ Rule 3 was criticised as a thinly-disguised place of wrong standard containing

1) 286N.E. 2d. 454 at pp. 457-458 (1972)

2) 111 R.L. 657, 306A 2d. 808 (1973)

an exception so vague that it destroyed the certainty of application that a rule approach seeks.

Weintraub¹⁾ after analysing Neumeier v. Keuhner and Hurtado v. Superior Court proposed three rules. His first rule is applicable to false conflict situations. He said if in the light of its contacts with the parties or the transaction only one state will have the policies underlying its tort rule advanced, apply the law of that state. Weintraub continues with:-

"2. 'True Conflict' cases: If two or more states having contacts with the parties or the transaction will have the policies underlying their different tort rules advanced, apply the law that will favor the plaintiff unless one or both of the following factors is present:

- a. That law is anachronistic
- b. The state with that law does not have sufficient contact with the defendant or the defendants actual or intended course of conduct to make application of its law reasonable.

3. "No Interest" cases: If none of the states having contacts with the parties or the transaction will have the policies underlying its tort rule advanced, apply the law that will favor the plaintiff unless one or both of the following factors is present:

- a. That law is anachronistic
- b. The state with that law does not have sufficient contact with the defendant or the defendant's actual or intended course of conduct to make application of its law reasonable.

Again the problem with such rules is the difficulty of classifying the fact situation into 'false', 'true' or 'no interest' cases. It is interesting to note that Weintraub justifies rules favoring the plaintiff on the grounds that the tortfeasor can take out insurance to cover

1) Weintraub, op.cit. supra at p. 52 note 4 at pp.162-163

himself, however whilst discussing Hurtado Ratner¹⁾ points out that in effect a defendant might have only limited protection. He suggests that a Californian defendant will probably find that his insurance provides no cover more than fifty miles below the border and that the Mexican insurance that many Americans obtain upon driving into Mexico is limited to the amount of recovery under Mexican law or not much more.

Whilst the 'Proper Law of the Tort' and the American Restatement (Second) do not have the specific problem of true, false, no interest divisions, uncertainty and difficulties exist to possibly the same degree. Boys v. Chaplin²⁾ as discussed by academic writers illustrates this. Lord Denning M.R. in the Court of Appeal³⁾ applied the proper law of the tort - that is English law and Shapira⁴⁾ having analysed the case as a false conflict and applied the proper law asserts that "there is no conceivable basis for an assertion of interest by Malta in the application of its law ...⁵⁾ He says Malta's only connection with the case is that the accident occurred within its boundaries, England on the other hand had a clear interest in the application of its "general damages rule..."⁶⁾

1) Ratner op.cit. at p.34 note 4 at p.835

2) [1971] A.C. 356

3) [1968] 1 All E.R. 283

4) A. Shapira. A Transatlantic Inspiration: The Proper Law of the Tort Doctrine. 33 M.L.R. 27 at p.30 (1970)

5) Ibid at p. 31

6) Ibid at p. 34

Nygh¹⁾ however notes that in a sense the English connection was as fortuitous as the place of the accident. Malta could be seen as having an interest in applying its restrictive damages rule to accidents in Malta even as between foreigners.

Pearl²⁾ is as adamant as Shapira as to the proper law, however he considers it to be maltese law as "...the links connecting the proper law with England - British servicemen on duty abroad, both drivers insured by English insurance companies, and the plaintiff seeking hospital treatment in England - are all unimportant in comparison with the connecting factor between the proper law and malta: the locus. In such a case as the present the proper law of the tort should be the lex loci on the simple ground that when foreigners drive on strange roads, they are impliedly bound by the criminal and the civil laws as well as the administrative regulations of the lex loci unless a special contractual relationship ... can be imposed ..."³⁾

It is perhaps little wonder that some courts have opted to apply the traditional law rather than face the problems inherent in the alternatives. One can feel a certain sympathy with the sentiments expressed by the Michigan Supreme Court⁴⁾ when asked to apply the Second Restatement it decided not to abandon the lex loci as

1) Nygh, op.cit. supra at p.48 note 3 at p. 947

2) D. Pearl. Case & Comment Camb. L.J. 219 (1968)

3) Ibid at p.222

4) In Abendschein v. Farrell 382 Mich. 510, 170, N.W. 2d. 137 (1969) discussed by Sedler op.cit. supra at p.43 note 5.

"...the quagmire of unanswerable questions arising out of the proposed new doctrine appears less attractive than our admittedly hard and fast - and occasionally unjust it is true - rule that the law of the place of the wrong is applied when the forum is a Michigan Court ..."¹⁾

The Court obtains one's total support and sympathy when an academic writer can say in reply that

"...it is hard to conceive of a more circular, amphibolic, elenctic and fatuous statement to support the retention of the lex loci rule..."²⁾

O-O-O-O-O

1) Ibid at p.139.

2) S.I. Shuman. Conflict of Laws 16 Wayne L.R. 535 at p.554 (1970)

PART B LEGISLATIVE SOLUTIONS

By way of introduction it should be noted that very few English Statutes deal exclusively or even substantially with questions of conflict of laws, "...no other branch of law has been so completely a judicial creation..."¹⁾ On the other hand in Europe various Codes have made legislative provisions at a national level for the choice of law dilemma. These laws are generally what Cavers²⁾ calls "legislatively localised laws", in other words they are limited by their terms either to "certain events or transactions within the enacting state" or "to certain persons connected with that state in a specified way, even though the acts or events involving them occur outside the state."

Part B starts with the legislative possibilities for international accidents represented in diagrammatical form. The possibilities range in scope from world participation in a multilateral treaty or convention for all torts (and thereby including accidents) to national legislation for international accidents alone. A mid way possibility is regional participation in a convention which deals with all torts or alternatively just international accidents. Examples of each possibility are given. These

1) R.H. Graveson. Philosophical Aspects of the English Conflict of Laws. 78 L.Q.R. 337 at p. 353 (1962)

2) D.F. Cavers. The Choice-of-Law Process. p.225-6 (1965)

are:-

1. For world participation in a convention dealing with all torts the late Professor Jitta's views are discussed. A note on Uniform Laws follows.
2. For regional participation in a convention dealing with all torts The European Economic Community Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations 1972.¹⁾ (hereinafter referred to as the E.E.C. Draft), and the Tentative Draft of a Foreign Torts Act proposed by a Special Committee of the Conference of Commissioners on Uniformity of Legislation in Canada in 1966.²⁾ (hereinafter referred to as the Draft Foreign Torts Act (Canada)) are discussed.
3. For regional participation in a convention dealing exclusively with traffic accidents the Hague Convention on the Law Applicable to Traffic Accidents 1968³⁾ is discussed together with the Canadian Conditionally Approved Draft of a Uniform Conflict of Laws (Traffic Accidents) Act.⁴⁾⁵⁾ (hereinafter

- 1) In English in 21 Am.J.Comp.L. 587 (1973)
- 2) Report of proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada p.62 (1966)
- 3) In English in 16 Am. J. Comp.L. 589 (1968)
- 4) Printed in 18 Am. J. Comp. L. 36 at p.36-37 (1971)
- 5) See Appendices A, B and C for the complete E.E.C. Draft, the Canadian Draft (Traffic Accidents) Act and the Hague Convention on the Law Applicable to Traffic Accidents 1968 respectively.

referred to as the Canadian Draft (Traffic Accidents) Act.

4. For national legislation the following are discussed:

- a) New Zealand's Accident Compensation Act 1972
- b) Article 25 of the Preliminary Dispositions of the Italian Civil Code of 1942¹⁾ (hereinafter cited as Article 25 Italy).
- c) Shapira's Draft Bill for Israel²⁾ (hereinafter cited as Shapira's Bill).

The few examples given above have been chosen as they represent examples of actual and proposed legislation from a variety of jurisdictions. Part B concludes with a brief note on the difficulties of codification.

1) Translated by P.D. McCusker 25 Tulane L.R. 70 at p.82 (1950)

2) A. Shapira. Manna for the Entire World or Thou Shalt Love Thy Neighbour as Thyself. Comment on Neumeier v. Kuehner 1 Hofstra L.R. 168 (1973) and set out in full infra at p.105 et.seq.

LEGISLATIVE POSSIBILITIES

Multilateral Treaties or Conventions		v.	National Legislation	
			Uniform Laws	
World Participation			Regional Participation	National Legislation
A	C		eg. All E.E.C. Countries, all P v. E ¹⁾	E
B	D		jurisdictions.	B
All Torts, delicts non-contractual obligations			Specific Torts or fact situations eg. motor vehicle accidents.	All torts, delicts non-contractual obligations

Examples -

1. AB & AD ... Jitta. 1.(b) Uniform Laws
2. CB ... The E.E.C. Draft
- 2.(b) ... Draft Foreign Torts Act (Canada).
3. CD ... The Hague Convention on the Law
Applicable to Traffic Accidents 1968.
- 3.(b) ... The Canadian Draft (Traffic Accidents)
Act.
4. ED ... New Zealand Accident Compensation Act 1972
5. EB ... Article 25 Italy.
- 5.(b) ... Shapira's Bill

1) Phillips v. Eyre

1. The possibility of world wide ratification of a treaty or convention is obviously unrealistic although there have however been optimists appearing from time to time who contemplate such a possibility. For example a Dutch Professor of Private International Law, D. Joesphus Jitta, writing at the beginning of the century suggested that legal relationships of an international character should be submitted to the "international common law of mankind" consisting "of principles of law recognised by all nations as emanations of natural reason"¹⁾

It has been suggested that even if supranational laws could be developed they would fail because they could not take account of local elements, the legal traditions and general expectations actually involved; and a law which failed to take these elements into account would be as unsatisfactory as an application of the municipal law of the *lex fori*²⁾.

1.(b) Uniform Laws:

It has been suggested that results could be achieved more easily by the adoption of uniform rules rather than by the preparation and ratification of multilateral treaties or conventions.³⁾ These internationally agreed rules of substantive law would be written as if they were national rules of Private International law and countries which for political or other reasons would not ratify a convention

1) D.J. Jitta. The Renovation of International Law on the Basis of a Juridicial Community of Mankind. 1 et.seq. and 91 (1919)

2) See G.G. Hoff. Adjustment of Conflicting Rights 38 Virginia L.R. 745 at p. 751 (1952)

3) See The American Proposal At The Hague Conference on Private International Law to Use The Method of Uniform Laws in 7 Am.Jo. Comp. Law pp.239-247 (1958)

would thus be able to introduce the uniform rules into their national law on their own initiative.

Shapira¹⁾ considers that certain torts lend themselves to this type of legislation. Mass air accidents and defamation he cites as examples and suggests that they might best be handled by the concurrent enactment of uniform substantive laws on the matter. Morse²⁾ considers pollution problems would be best dealt with in this way.

2. In June 1972 The E.E.C. Draft was completed. Article 10(1) contains the basic rule for torts, its states:

"1. Non-contractual obligations resulting from an event causing damage shall be governed by the law of the State in which such event occurred."

Morse criticises this general rule in favor of the *lex loci delicti*; he suggests that the drafting is "so defective ... that it can be regarded as establishing either the place of acting as the basic rule, or the place of harm where those places are different."³⁾ He goes on to say that:

"The position is obscured to an even greater degree when one reads that the working group did not intend to resolve the dilemma which exists in the ascertainment of the *lex loci delicti* where the place of acting and place of harm are different 'in order not to impede ongoing developments in the jurisprudence of the Community Countries.'"

1) A. Shapira. *The Interest Approach to the Choice of Law with Special Reference to Torts Problems* (1970) (hereinafter cited as Shapira) Shapira p.239 note 135

2) C.G.J. Morse. *Torts in Private International Law* (1978) (hereinafter cited as Morse) p.323

3) Morse, pp.329-30

Unfortunately Morse does not state the source of the article 10 that he quotes and relies upon.¹⁾ Article 10 as printed in 21 Am.J. Comp. Law, which is the only reference he gives is translated as above. Morse however in setting out Article 10 on p.327 states Article 10(1) as follows:

"Non-Contractual obligations arising out of an event which has resulted in damage or injury shall be governed by the law of the country in which that event occurred."²⁾

This is more ambiguous than the Article 10 reported above which could possibly be intended as a place of injury rule. However if a general rule is to be followed by exceptions as the Draft is, it would be preferable to have as a general rule a clear and unambiguous rule.

It would seem to be of paramount importance that a general rule be certain.

Article 10 (2), (3) & (4) state as follows:-

"2. However, if, on the one hand no significant link exists between the situation resulting from the event which caused the damage and the State in which the event occurred and, if, on the other hand, such situation has predominant connection (connexion preponderante) with another State, the law of that State shall apply.

3. Normally, such a connection must be based on a connecting factor common to the victim and the author of the damage or, if the liability of a third party as author is involved, a connecting factor common to the victim and the third party.

-
- 1) On p.326 (note 19 p.347) Morse states the English Text is in 21 Am.J. Comp. Law.
 - 2) See note 29 p. 348 where Morse says "...the Article can comprehend a place of acting rule, in so far as it refers to the event which has resulted in damage or injury.

"4. Where there are two or more victims, the applicable law is determined separately for each of them.

Problems associated with Article 10 can be summarised as follows;¹⁾

1. Uncertainty of the basic rule (10(1)) as above.
2. Scope of 'non-contractual obligations' Article I excludes certain non-contractual obligations but the scope of the Draft is not clearly defined.
3. Lack of definitions for "significant link" "predominant connection" and "normally".
4. To treat victims differently 'S10(4) could offend some state's notions of natural justice.

Article 11:

"The law applicable to non-contractual obligations under Article 10 shall determine in particular

1. the conditions and extent of liability;
2. the grounds for exemption from liability as well as any limitation and division of liability;
3. the existence and nature of damages for which there may be compensation;
4. the kinds and extent of compensation;
5. the extent to which the victim's rights to damages may be exercised by his heirs;
6. the persons who have suffered damage and may claim damages in their own right;
7. vicarious liability;
8. rules of prescription and limitation, including rules relating to commencement of a period of prescription or limitation, to interruption or suspension of such a period.

Article 12:

Whatever the applicable law under Article 10, in determining liability account shall be taken of rules of safety and public order in force at the place and time of the event which caused the damage.

1) Discussed in detail by Morse p.326 et.seq. especially at pp.330-333

Article 13:

"Non-contractual liability resulting from an event other than one causing damage shall be governed by the law of the State in which such event occurred. However, if due to a connecting factor common to the parties involved, a predominant link exists with the law of another State, that law shall be applied.

Article 14:

"The provisions of Articles 10 to 13 shall not apply to the liability of States or other legal persons of public law, or to that of their organs or agents for acts involving public administration and done by them in the performance of their functions.

Article 15:

1. The law governing an obligation shall also determine requirements pertaining to its execution, the various ways in which it may be discharged and the consequences of non-execution.
2. As regards the means of execution of an obligation, the law of the State where the execution takes place shall be taken into account.

Morse makes specific criticisms of these articles¹⁾ and concludes that these are "symptomatic of a more fundamental problem - the problem of reconciling the need to avoid the mechanical jurisprudence of traditional doctrine without engendering an unacceptable level of uncertainty."²⁾ It is the writer's view that the Draft is unnecessarily complex. This point is discussed below.

2. (b) The Tentative Draft of a Foreign Torts Act 1966
proposed by a Special Committee of the Conference of
Commissioners on Uniformity of Legislation in Canada

1) Morse, pp.333-336

2) Ibid at p. 335

is of particular interest as it involves proposed legislation for both Phillips v. Eyre jurisdictions and French Civil Law provinces.

In 1956 the Conference of Commissioners on Uniformity of Legislation appointed a Committee to study a proposal put forward by the Canadian Bar Association that Phillips v. Eyre be amended. The following year in a preliminary report the Committee urged that in view of the numerous criticisms the Committee should not confine its study to the proposed Amendment alone but should consider the desirability of replacing the formula with some new principle.¹⁾

Nine years later the Committee put forward the following proposed Act:-

"Foreign Torts Act

1. When deciding the rights and liabilities of the parties to an action in tort the court shall apply the local law of the state which has the most substantial connection with the occurrence and with the parties regardless of whether or not the wrong is of such a character that it would have been actionable if committed in this Province.

2. When determining whether a particular state has a substantial connection with the occurrence and the parties the court shall consider the following important contacts:

- a) the place where the injury occurred;
- b) the place where the conduct occurred;
- c) the domicile and place of business of the parties; and
- d) the place where the relationship, if any, between the parties is centred.

3. When deciding which state, among the states having any contacts with section 2, has the most substantial connection with the occurrence and

1) See 1957 Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada p. 122 at p. 125 and see H.E. Read What Should be the Law in Canada Governing Conflict of Laws in Torts. Canadian Legal Studies 1 at p.277 (1968) (hereinafter cited as Read)

the parties, the court shall consider chiefly the purpose and policy of each of the rules of local law that is proposed to be applied."¹⁾

Whilst resembling the American Restatement, Second, in its approach Hancock²⁾ suggests that in its general conception the Draft Act is of British origin and he refers back to "the Proper Law of the Tort" enunciated by Morris in the 1950's.

The differences to the Restatement, Second, can be listed as follows:-

1. Section 1 of the Draft Act refers to an "action" rather than an "issue" in tort which perhaps excludes the possibility of applying different laws to different issues in a case.
2. The first limb of Phillips v. Eyre is abolished by the Draft Act.
3. Residence and nationality in 2(c) of the Restatement, Second, are not incorporated into 2(c) of the Draft Act. This is perhaps a pity. If the object of legislation in this field is to work towards uniformity it would be good manners at an international level to include nationality.³⁾
4. The Draft Act has no equivalent of Paragraph 6 of the Restatement, Second, by section 3 the court shall consider "chiefly" the purpose and policy of each of the rules of local law that is

1) Report of Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada 1966 at p.62.

2) M. Hancock. Canadian American Torts in the Conflict of Laws: A Revival of Policy-Determined Construction Analysis 46 Can. Bar Rev. 226 at p. 248 (1968)

3) See *infra* at p.115 It would have been preferable to avoid such conflicts altogether in view of the domicile-nationality controversy prevailing in common law and civil law jurisdictions.

proposed to be applied. Express reference to the relative interests of concerned states is excluded, however Morse¹⁾ contents that a Court would inevitably consider these interests if asked to apply the Draft Act.

5. The Draft Act applies to all torts whilst the Restatement, Second, has specific rules for individual torts.

Despite these differences the Draft Act is basically similar to the Restatement Second, and many of the criticisms of the latter can be applied to the Draft. It would not be an easy Act to apply in practice, its inherent vagueness would be of little assistance to judges or members of the bar. Hancock²⁾ appears to commend the Draft Act when writing in 1968 by hoping it would receive the "recognition and support it deserves".³⁾ However, he seems to see its chief merit being in that it would do away with Phillips v. Eyre rather than it having an intrinsic merit.

The Draft has not come into force.

3. The two most important provisions of The Hague Draft Convention on the Law Applicable to Traffic Accidents 1968 are Articles 3 and 4 which state:

"The applicable law is the internal law of the State where the accident occurred.

Article 4:

"Subject to Article 5 the following exceptions

1) Morse, p. 325

2) Hancock, op.cit. supra at p.82 note 2 at p.248

3) Ibid at p. 251

are made to the provisions of Article 3 -

a) where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability

- towards the driver, owner or any other person having control of or an interest in the vehicle irrespective of their habitual residence,
- towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred.
- towards a victim who is outside the vehicle at the place of the accident and whose habitual residence is in the state of registration.

Where there are two or more victims the applicable law is determined separately for each of them.

b) Where two or more vehicles are involved in the accident, the provisions of (a) are applicable only if all the vehicles are registered in the same State.

c) Where one or more persons outside the vehicle or vehicles at the place of the accident are involved in the accident and may be liable the provisions of (a) and (b) are applicable only if all these persons have their habitual residence in the State of registration. The same is true even though these persons are also victims of the accident."¹⁾

Unlike the E.E.C. Draft the general rule in Article 3 is unambiguous, the place where the traffic accident occurred is to apply. Article 2 states that the Convention shall not apply to the liability of manufacturers, sellers or repairers of vehicles thus avoiding any potential problems of accidents occurring in one state caused by an event in another state.

1) See generally J.G. Castell and P.A. Crépeau, Views from Canada. 18 Am.J. Comp.Law 17 at pp.19-25 (1971)

By way of exception the only other law which can apply is the law where the vehicles are registered. The drafting does however appear to be unnecessarily complex and Cavers¹⁾ has pointed out that if the convention was widely ratified ease and certainty of application would be purchased at a "considerable price"²⁾ and he gives various fact situations which would "produce choices that seem arbitrary"³⁾

For example:-

(1) A German invited an Englishman whose acquaintance he has made in Paris to drive to the airport in his German registered car. The Englishman is killed in a one-vehicle crash. The Convention would restrict the Englishman's family to the level of recovery permitted by German law which is lower than that allowed by either French or English law. The Convention would not deprive a French passenger in the same car of the French standard of financial protection in these circumstances; there appears no good reason to deny equal treatment to the Englishman.

(2) A German driver loses control of his German-registered car and runs into a queue of Frenchmen waiting for a bus in Paris. Several were killed. One of them had his habitual residence in Germany. His family may recover only the economic damage recoverable under German law.

There appears nothing to be gained from introducing such complexity into the Convention and as Cavers illustrations show the results could be unjust.

Another unnecessarily complex piece of legislation is the Canadian Draft (Traffic Accidents) Act.

1) D.F. Cavers. Legislative Choice of Law: Some European Examples. 44 S.Calif. L.R. 340 at pp.354-359 (1971)

2) Ibid at p. 358

3) Ibid at p. 356

Article 3 applies the law of the state where the accident occurred as a basic rule but this is eroded by the following Articles. Article 4 allows the state of registration to be the applicable law in certain situations and article 7 allows the law of the state where a vehicle was "habitually stationed" to apply in the situations stated in 7(a) and 7(b). The criticisms levelled at the Hague Convention on the Law Applicable to Traffic Accidents 1968 equally apply here.

4. New Zealand's Accident Compensation Act 1972 is an example of national legislation which considers actions occurring outside New Zealand. The legislature has, like the Hague Convention on Traffic Accidents taken one fact situation, namely personal injury by accident and in the one Act has dealt with both the domestic and conflict aspects of the problem. Torts that do not involve personal injury by accident remain to be determined by the common law.

In 1972 the Accident Compensation Commission was created by the Accident Compensation Act and on 1st April 1974 the Accident Compensation Scheme started to work. The fault concept which was fundamental to the common law was "thrown out and accident compensation for everyone was written into the law."¹⁾ The Woodhouse Report from which the Act initially originated was based upon the principles of community responsibility, rehabilitation, real compensation and administrative efficiency.²⁾ The

1) H.W. Dahl. Injury Compensation for Everyone? The New Zealand Experience. 53 Jo. of Urban Law 925 (1976)

2) Report on the Royal Commission of Inquiry: Compensation for Personal Injury in New Zealand. 39 (1967).

Report gave some consideration to the international aspects of accident compensation; for example paragraphs 286 and 287 hold as follows:

286. New Zealand Residents Injured Overseas

- (a) New Zealand residents temporarily abroad for periods not exceeding twelve months should continue to enjoy the protection of the scheme.
- (b) In the case of New Zealand Residents absent from the country for periods longer than twelve months, protection should be continued upon application to and at the discretion of the controlling authority.
- (c) The level of compensation for hospital and medical attention should be limited to equivalent charges for those services in New Zealand.
- (d) On the principle that a man should not be compensated twice for the same injury, compensation received by a New Zealand resident should be refunded out of any damages or compensation obtained by him in respect to the same accident.
- (e) On the other hand we do not think it necessary that New Zealand residents should be required to take action abroad for recovery of these amounts. The return to the fund would rarely justify the administrative problems or the costs.
- (f) In certain cases, at least, the assessment of permanent partial disability and payment of compensation in respect of such a disability would have to await return to the country.

287. Visitors to New Zealand

- (a) In general a visitor to a country always takes it as he finds it, and the absence of common law rights in respect of personal injury claims would not justify, in our opinion, an extension of the comprehensive insurance system to include visitors. New Zealanders abroad are obliged to accept risks of this sort and usually insure in respect of the contingency.
-

- (b) On the other hand persons employed by a New Zealand employer should be protected if injured at any time or place within New Zealand while the contract of service remains current. In such cases the employer concerned would qualify the employee by reason of the contribution to the fund based upon payments of wages.
- (c) Persons employed by employers domiciled outside New Zealand should be protected in terms of regulations designed to meet circumstances of this sort.
- (d) Visitors in general should be permitted and perhaps encouraged to obtain the protection of the scheme on a voluntary basis on terms approved by the controlling authority."

The most important section in the Act is section 5 which states that "where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment..."

From a conflict of laws standpoint there are a number of interesting fact situations; these are firstly situations where New Zealanders suffering personal injury by accident outside New Zealand bring an action in New Zealand; secondly situations where non New Zealanders bring an action in New Zealand for injury occurring

outside New Zealand and thirdly cases where non New Zealanders injured in New Zealand bring an action in a foreign jurisdiction.

The first situation is simply decided. New Zealanders injured abroad must, to be eligible under the Accident Compensation Act fall within Sections 60, 61 and 63 in other words they must all be earners of some kind and their presence overseas must have something to do with their employment or the earning of money. All other New Zealanders tourists being the obvious group with the greatest numbers, are not entitled to compensation if they suffer personal injury by accident while overseas. Even those New Zealanders who do come under Sections 60, 61 and 63 are not automatically entitled to compensation. Their rights are set out in Section 131 of the Act.

To differentiate between tourists and New Zealanders working overseas appears arbitrary and contrary to the philosophy behind the Act, namely that New Zealanders should enjoy compensation twenty-four hours a day.

Non eligible New Zealanders therefore join the second category, that is non New Zealanders bringing an action in New Zealand in respect of an overseas accident. Section 5 of the Act is not relevant to these persons although the section becomes indirectly relevant when the plaintiff is establishing actionability in New Zealand. It will be recalled that the first limb of Phillips v. Eyre required that "...the wrong must be of such a

character that it would have been actionable if committed in (the forum) ..."¹⁾ or "... in other words is an act which if done in (the forum) would be a tort..."²⁾

The Plaintiff in order to succeed must argue that Section 5 did not abolish the common law and that all Section 5 does is to prohibit the bringing of proceedings for damages where compensation is payable under the Act. The action itself is not abolished.³⁾ If the plaintiff is not entitled to compensation under the Act section 5 does not apply and a common law action could be brought. Support for this argument can be found in the fact that exemplary damages have been awarded in personal injury claims since the Act came into force.

In Howse v. The Attorney-General⁴⁾ for example O'Regan J. held that:

"...punitive damages do not attach and form part of compensatory damages. They stand apart and must be considered apart from such ... punitive damages arise ... from the acts done contrary to law and not from the harm to the plaintiff caused by such acts ... (thus) .. the punitive damages .. do not arise either directly or indirectly out of the personal injury which he suffered by accident..."

Hence the action in so far as it related to punitive damages was not barred by Section 5(1).

Following this decision it was argued that, although unlikely, a Court might award punitive damages in a motor vehicle accident causing personal injury if

1) (1870) L.R.6 Q.B.1. at pp.28-29 per Willes J.

2) Dicey & Morris Rule 178(1)(a) The Conflict of Laws 9th Edit. p. 938

3) M.A. Vennell. The Scope of National No-Fault Accident Compensation in Australia and New Zealand 49 A.L.J.22 (1975) argues this.

4) Sup.Ct. (Palmerston North) 19 October 1977 (A.132/75)

the defendant had behaved in some outrageous manner."¹⁾

However, two later Supreme Court cases take an opposing view. Jeffries J. in Betteridge & Another v. McKenzie & Others²⁾ disagreed with the decision in Howse and held that exemplary damages arose, indirectly at least, out of the injury and that the action for exemplary damages was therefore barred. Likewise McMullin J. in Stowers v. The Mayor, Councillors and Citizens of the City of Auckland³⁾ held the same. Prior to Stower's case academic writers had been divided on the issue.⁴⁾ If Howse is not followed in the future a plaintiff could still perhaps argue that section 5 has not abolished the common law as in Betteridge & Another v. McKenzie & Others Jeffries J. following Donselaar v. Donselaar⁵⁾ held that

- 1) R.P. Boast. In Spite of Accident Compensation Injury Claims can Still go to Court. Automobile Association Motor World Dec.78/Jan.79
- 2) Sup.Ct. (Wellington) 24 November 1978 (A103/77).
- 3) Sup.Ct. (Auckland) 22 February 1979 (A.1064/77)
- 4) D.B. Collins. Proceedings for Punitive Damages In the Regime of Accident Compensation. N.Z.L.J. 158 (1978) argues for the view taken by O'Regan J. in Howse v.A.G. whilst R.D. McInnes. Punishing the Words of Section 5(1) The Other School of Thought Replies. N.Z.L.J. 8 (1969) takes the view that S.5(1) effectively bars proceedings for exemplary damages in a situation of personal injury by accident. A.A.P. Willy. The Accident Compensation Act and Recovery for Losses Arising From Personal Injury and Death by Accident. 6 N.Z.U.L.R. 250 (1975) takes the view that an injured plaintiff is precluded by S.5 from bringing an action at common law to recover exemplary damages but leaves open the question of whether the cases involving personal injury in the context of some other additional tort such as false imprisonment or intimidation, may not arise in respect of which an award of exemplary damages may be justified.
- 5) Sup.Ct. (Wellington) 25-29 July 1977 and August 1977 (A.454/76)

"...the legislature did not wish to exclude other remedies such as injunction, for example."

The plaintiff's argument here can be said to be in accordance with the policy of the Act. The policy of the Act is to replace certain common law actions with a statutory form of relief. The plaintiff gives up his right to bring an action but this is counteracted by giving him something else - a statutory remedy allowing compensation. When the person is not covered under the Act he is compensated by the fact he still has his common law action. The plaintiff could argue that any other interpretation would be unjust.

The plaintiff should not have difficulty with the second limb of Phillips v. Eyre¹⁾ which requires that "...the Act must not have been justifiable by the law of the place where it was done..." in situations not involving Workmen's Compensation Acts.²⁾ If the conduct causing the personal injured occurred in, say a Canadian province such as Ontario which has a Workman's Compensation Act and which would be applicable if the plaintiff had brought his action in Ontario then his position is less strong. The Privy Council cases of Walpole v. Canadian Northern Railway Co.³⁾ and McMillan v. Canadian Northern Railway Co.⁴⁾ are relevant here.

1) (1870) L.R.6 Q.B.1. at pp.28-29 per Willes J.

2) J.G. Castel. Canadian Conflict of Laws Vol.2 pp.633-634 (1975) discussing the several statutory motor vehicle accident reparation schemes which have been adopted in Canada says "these schemes, by diminishing a Victims right to recover in tort to the extent of the benefits received or payable, may constitute a good defence to an action based on an accident taking place in one of the provinces of Canada under Phillips v. Eyre."

3) [1923] A.C. 113

4) [1923] A.C. 120

In both cases the action was brought in Saskatchewan whilst the negligent conduct occurred in British Columbia and Ontario respectively. In both jurisdictions the loci delicti had Workmen's Compensation Acts which barred common law court actions. Viscount Cave said in Walpole's case that the deceased held his contract of employment subject to the double condition that firstly he should be entitled to compensation for accidents, however caused, and secondly, that he should have no other remedy, and whilst Viscount Cave considered it unnecessary to consider the precise meaning of justifiable he did say:

"...at all events, it must have reference to legal justification, and an act or neglect which is neither actionable or punishable cannot be said to be otherwise than justifiable within the meaning of the rule..."¹⁾

and in McMillan Viscount Cave said

"...the mere fact that the employer is liable to pay compensation for such an accident does not in my opinion, attach any character of wrongfulness or unjustifiableness or guilt (as opposed to innocence) to the act upon which an action in this province founded entirely on tort, can be supported. The gist of the action is negligence, the ground for compensation is the accident."²⁾

Both plaintiffs failed. However if the plaintiff is a New Zealander he would either be a section 60,61 and 63 New Zealander and therefore within the New Zealand Accident Compensation Act or if he is a tourist then he will not be within the scope of such acts as the Workmen's Compensation Act of British Columbia, so in this latter

1) [1923] A.C. 113 at p. 119

2) [1923] A.C. 120 at p. 125

case he should be able to satisfy the requirement of non justifiability by the *lex loci delicti*. If, on the other hand, the plaintiff is a non New Zealander and brings an action in New Zealand then if one makes him a Canadian from Ontario and that was where the accident occurred it will be a Walpole and McMillan situation and he could fail. If however the accident occurs in Ontario but in a situation where the Ontarian Act does not apply the plaintiff could presumably establish non justifiability but he could well be faced with the possibility of a stay on the grounds of forum shopping. On the other hand if the plaintiff, still from Ontario, suffers personal injury by accident whilst in Fiji which has no compensation legislation whatsoever he should be able to succeed under the second limb of Phillips v. Eyre¹⁾ and if the defendant is a New Zealander who after the accident returned home where all his assets are situated then the plaintiff should not have too much difficulty regarding forum shopping.

Perhaps from the point of view of the Accident Compensation Act and Conflict of Laws the third situation is the most interesting. This involves the cases where non New Zealanders suffer injury to their persons whilst

3) "...There is no earnings related compensation paid in respect of your earnings outside New Zealand, but you could, after you have left this country, continue to receive compensation based on your loss of New Zealand earning capacity.." Accident Compensation Commission for Travellers Arriving in New Zealand (1975) 5.

1) (1870) L.R.6 Q.B.1 at pp.28-29 per Willes J.

in New Zealand and then on returning home bring an action in their local courts. This is a real possibility as visitors to New Zealand are not entitled to compensation pursuant to the earners scheme.³⁾ Cover under the Act is defined as cover under one or more of the three compensation schemes set up by the legislation;¹⁾ these are the earners scheme, the motor vehicle accident scheme and the supplementary scheme. The last mentioned scheme provides cover for personal injury in New Zealand for all those not having cover pursuant to the other two schemes. A visitor is covered under the second scheme (section 93) if he is injured but he will not be able to obtain compensation for loss of past or future earnings. As Section 5 will thwart any attempt by the plaintiff to recover for loss of earnings in New Zealand his only option is to bring an action in the state or country in which he resides, and here different considerations arise depending on whether the court chosen by the plaintiff is in a state or country adhering to Phillips v. Eyre or not.

Webb and Auburn²⁾ in discussing the case of the plaintiff bringing his action in a Phillips v. Eyre jurisdiction other than New Zealand start by noting that the "...defendant might request a stay in reliance upon the modifications to the general rule laid down by Scott L.J. introduced by the majority of the House of Lords in The Atlantic Star". However Webb and Auburn suggest that unlike

1) Section 2(1)

2) P.R.H. Webb and F.M. Auburn. New Zealand Conflict of Laws in a Birds Eye View. (hereinafter cited as Webb and Auburn.) 26 I.C.L.Q. 971 at p.972 (1977)

3) See note 3 on p.94

the fact situation in *The Atlantic Star* the plaintiff would have a good case because he would be seen to have a strong connection with the forum - it being his country of residence. The plaintiff would not presumably be held to be forum shopping, they say, and point out that granting a stay in this situation would be unjust.

The plaintiff should have no difficulty with the first limb of Phillips v. Eyre as no Phillips v. Eyre jurisdiction has an Accident Compensation Act with a Section 5.

As outlined in Part A different interpretations have been placed on the words "not justifiable" and a plaintiff might succeed in one jurisdiction but fail in another. Bell¹⁾ takes the view that whilst a Scottish plaintiff would fail a Canadian plaintiff might be able to establish some breach of New Zealand criminal law and cites for example Culpable Homicide in the case of death (section 160 Crimes Act 1961) and Injuring by an Unlawful Act (Section 190 Crimes Act 1961)

Much depends on the interpretation future cases will give to Boys v. Chaplin²⁾ and that case's effect on Machado v. Fontes.³⁾ Webb and Auburn⁴⁾ note La Van v. Danyluk⁵⁾ a 1970 decision of the Supreme Court of British

1) R.M. Bell. Conflict of Laws Aspects of the Accident Compensation Act: 1975 Dissertation for LLB (Hons) University of Auckland (1975) p. 76 et.seq. (hereinafter cited as Bell.)

2) [1971] A.C. 356

3) [1897] 2 Q.B. 231

4) Webb and Auburn at p. 988

5) (1970) 75 W.W.R. 500

Columbia. Both parties were from British Columbia and the accident occurred in the State of Washington where contributory negligence is a complete defence. British Columbia law only reduces damages in this situation. The rule in the State of Washington could be circumvented by interpreting "not justifiable" as either referring to civil or criminal liability. Webb and Auburn¹⁾ suggest that the Canadian view would be particularly attractive in the not unlikely situation of a young New South Wales businessman "enjoying a substantial income and excellent future prospects being incapacitated whilst a visitor to New Zealand in the normal circumstances in which he would not be eligible within the earner scheme."

Webb & Auburn²⁾ also refer to the Privy Council decisions of Walpole v. Canadian Northern Railway Co. and McMillan v. Canadian Northern Railway Co. as discussed above.

They also consider other factors a plaintiff would invoke, such as the flexibility argument in Boys v. Chaplin³⁾ and the argument that the New Zealand legislation was contrary to the public policy of the forum. Webb & Auburn⁴⁾ consider it unlikely that a Commonwealth Court would accept the latter argument.

It must however remain a matter of speculation as to whether a plaintiff would or would not succeed if

1) Webb & Auburn pp.988-989

2) Ibid

3) [1971] A.C. 356 at p. 406 per Lord Pearson

4) Webb & Auburn p.989

he brought an action in a Phillips v. Eyre jurisdiction for personal injury sustained in New Zealand whilst a visitor here.

The final situation envisages a non New Zealand plaintiff bringing an action in a jurisdiction which does not adhere to the Phillips v. Eyre conditions for an accident occurring in New Zealand. Bell¹⁾ has outlined a number of situations where he considers a foreign court might apply its own law. Firstly the forum might consider that sections of the Act go beyond the policy of the Act which is to replace a plaintiffs right to bring an action by giving him compensation pursuant to the Act itself. This would apply to visitors unable to succeed under the earners scheme.

The second situation envisaged by Bell is where the foreign court considers that although the plaintiff has entered New Zealand he should not be regarded as having submitted himself to New Zealand's compensation laws.

"In personal injury cases it is not necessarily true that by entering a country you submit yourself to the special laws of that country."²⁾

Here the plaintiffs presence in New Zealand is purely fortuitous, it is a case, for example, where a foreigner is on a flight between Sydney and Fiji which is diverted to Auckland for one reason or another. Through passengers

1) Bell, p.82 et.seq.

2) Boys v. Chaplin [1971] A.C. 356 at p.380 per Lord Hodson

could also come into this category¹⁾.

Bell's third group consists of situations where both the parties are of the same nationality or domicile or residence and are here temporarily or there is some other special relationship between the parties that is based outside New Zealand. In this situation Bell suggests that a court might well choose to apply its own law, he gives the fact situation of Babcock v. Jackson²⁾ and Boys v. Chaplin³⁾ as examples of his second and third situations respectively.

Applying the proper law of the tort concept a court in an American State might find that forum law was the appropriate law. Likewise an American Court might analyse the case in terms of "true" and "false" conflicts. If only one state or country is interested then that state's law will apply; presumably in the majority of cases this will be New Zealand but situations could arise where there is a true conflict with both New Zealand and some other state interested in the issue.

1) In 1978 there were 162,733 through passengers arriving and departing in New Zealand; this figure had jumped to 176,586 in 1979 and increased to 176,822 for 1980. Crews could also in certain cases be here fortuitously and their numbers made them a sizeable group. Crew arrivals into New Zealand in 1978, 1979 and 1980 numbered 182,176, 172,825 and 175,810 respectively while departure figures for the same period are 182,327, 173,817 and 176,795. New Zealand Official Year Book 1980. p.977.

2) 12 N.Y. 2d. 473 (1963)

3) [1971] A.C. 356

The forum which may or may not be the 'other state' then has to decide which law is to prevail and as, it is submitted, it is a natural tendency to prefer one's own law then the forum could well allow a plaintiff to succeed. This would seem especially likely if the plaintiff is only claiming loss of past and future earnings, as such a solution would appear to be a just solution.

Relevant here is the United States equivalent of Walpole's¹⁾ case and McMillan v. Canadian Northern Railway Co.²⁾ that is Wilson v. Faull³⁾ which was a decision of the Supreme Court of New Jersey.⁴⁾ The plaintiff unable to bring an action in one jurisdiction attempted to bring his action in another jurisdiction under the compensation laws of which the defendant was not protected. The court looked at the policy behind compensation statutes and found they involved a balance with both the employees and employers losing something on the one hand and both benefiting on the other. The employees lost their common law action but no longer had to prove fault whilst the employers incurred strict liability but became immune from common law actions. To allow a common law claim in another jurisdiction would upset this balance and therefore on policy considerations should not be allowed.

1) [1923] A.C. 113

2) [1923] A.C. 120

3) 141 A.2d. 768 (1958)

4) Cited and discussed by Bell p.97 et.seq.

This principle that the underlying policies of compensation laws should be recognised and upheld has been adopted by the Second Restatement.

Paragraph 184 holds:

"Recovery for tort or wrongful death will not be permitted in any state if the defendant is declared immune from such liability by the workmen's compensation statute of a state under which the defendant is required to provide insurance against the particular risk and under which -

- (a) the plaintiff has obtained an award for the injury, or
- (b) the plaintiff could obtain an award for the injury, if this is the state -
 - (1) where the injury occurred, or
 - (2) where employment is principally located, or
 - (3) where the employer supervised the employee's activities from a place of business in the state, or
 - (4) whose local law governs the contract of employment under the rules of paragraphs 187-188 and 196".

One can however argue that the difference between comparing North American Workers Compensation Acts, on the one hand, with each other and to comparing such legislation with the New Zealand Accident Compensation Act 1972 involves such a difference in scope as to render such comparison pointless.

Webb & Auburn¹⁾ and also Bell²⁾ discuss the possibility of the plaintiff framing his action in contract rather than tort law, and here again the result

1) Webb & Auburn, p.989

2) Bell, p.119 et.seq.

could differ if the forum was a Commonwealth or foreign court. The plaintiff in a Commonwealth Court would argue that a breach of contract action governed by New Zealand law would be allowable as section 5 only applies to actions brought within New Zealand.

Once again it is impossible to predict the outcome for a foreign visitor injured in New Zealand who later brings an action in his own state or country; as yet there appear to be no decided cases despite the arrival of some four and a half hundred thousand temporary visitors in 1980 to New Zealand.¹⁾

As a final matter for speculation is the question of enforcement of judgments in New Zealand. Webb & Auburn²⁾ discuss the possibility of a non New Zealand plaintiff successfully obtaining judgment in a foreign court seeking to enforce it in New Zealand. They suggest the plaintiff might be successful and state that this view is based on the words of the Act and not on an interpretation

1) New Zealand Official Year Book 1980, p.977 states for year ending 1978 390,940 temporary visitors arrived in New Zealand, in 1979 the number given is 418,744 and 1980 445,195. In 1978 there were 10,384 reported traffic accidents in New Zealand (654 people died and injuries to 15,176 other people were reported) and in 1980 there were 1,297,253 cars on New Zealand roads. Ibid at p.978. Unfortunately there appear to be no statistics available on the number of accidents involving visitors.

2) Webb & Auburn at p.990

or ambiguity in the legislation. Section 5(1) states that "no proceedings for damages arising directly or indirectly out of the injury ... shall be brought in any court in New Zealand independently of this Act ..."

Webb & Auburn¹⁾ argue that 'damages' can be seen to be used in the legal sense thus permitting proceedings for an injunction. "The words 'directly or indirectly' refer to 'damages' not to 'proceedings'".²⁾

To conclude, the New Zealand legislation has created a number of matters for speculation. The Act is not clear in its conflicts provisions, the absence of decided cases (because New Zealand is in a Phillips v. Eyre jurisdiction) means that the Act will remain uninterpreted for the immediate future. This has the effect of making it difficult to advise clients as to the possibility of success if they choose to litigate torts with an international element that result in personal injury by accident.

5. Turning to the Italian legislation the relevant provision is contained in the Second Paragraph of Article 25 of the Preliminary Dispositions of the Italian Code of 1942 which states:

"Non-Contract obligations are governed by the law of the place where the facts from which they arise took place."³⁾

1) Webb & Auburn p.990

2) Ibid

3) P.D. McCusker. The Italian Rules of Conflict of Laws
25 Tulane L.Rev. 70 at 82 (1950)

As a rule this provision has the serious limitation of uncertainty. McCusker¹⁾ for example interprets the article to mean that "the obligation to pay damages arising from the commission of a tort is governed by the law of the place of the tort (*lex loci delicti*) and not by the law of the place where the damage occurred" and cites an article by one Monaco as support.²⁾ However Cavers³⁾ interprets article 25 to include the place where the damage occurred. He says:

"The draftsmen, with accidental or studied ambiguity, have written a provision broad enough to embrace both the place where the Defendant's conduct occurred and the place where that conduct caused the plaintiff's injury. Both sets of facts are essential to his cause of action. Perhaps the rule was written to reflect the prevailing preference on the Continent for the law of the defendant's conduct, but it certainly could be stretched to support choosing the law of the place of injury."⁴⁾

This ambiguity on the place of acting, place of injury issue is not unique to Italy. The Benelux countries, Belgium, the Netherlands and Luxemburg together with France also leave the problem unresolved.⁵⁾ It is difficult to see why the respective draftsmen should retain the dilemma when from a practical point of view the difference can be vital.⁶⁾

1) Ibid

2) Ibid at p.83

3) Cavers op.cit. supra at p.85 note 1 at p.350

4) Ibid

5) Ibid at pp.350-351

6) see supra at p. 77.

In 1942 the Civil Law jurisdictions did seem to favor the place of acting,¹⁾ however it is possible that the Italian draftsmen intended to combine both theories. Rabel notes that the German Reichsgericht has combined the place where the actor engages in his conduct and the place where the effects of his conduct occur. The injured person could choose which of the two laws to sue under and the German Courts then applied that law. Rabel goes on to state that this view was followed by the Italian Supreme Court in 1927.²⁾ Possibly the Italian Legislature intended in Article 25 to give legislative status to the 1927 decision. Whatever was intended however remains obscure and this cannot be attributed to the novelty of legislation in Italy as the 1942 Code with its Preliminary Dispositions followed on from a previous Code with similar Preliminary Dispositions dating back to 1865.

5.(b) In 1973 Dr. Shapira in a Comment on Neumeier v. Keuhner³⁾ discussed a Draft Bill that he had submitted to the Israeli Ministry of Justice. The Draft which remains a Bill, reads as follows:-

" Choice of Law in Torts

A Draft Bill

1. Prima facie Applicability of Local Law

When deciding the rights and liabilities of the parties with respect to a tort committed wholly or partly abroad, a court in Israel shall apply Israeli law.

1) Rabel. The Conflict of Laws: A Comparative Study Vol.2 pp.303-4 (1960) 2Edit. (hereinafter referred to as Rabel).

2) Ibid at p.305

3) Shapira op.cit. supra at p.74 note 2

Israeli law shall not be displaced by foreign law except as hereinafter provided in this Act.

2. Displacement of Local Law by Foreign Law

- (a) A court entertaining an action in tort as aforesaid shall not displace Israeli law by foreign law unless convinced that, as to the issue or matter at bar, a foreign law has a closer relationship to the facts of the case and to the parties than has Israeli law.
- (b) When determining whether, as to the issue or matter at bar, a foreign law has a closer relationship to the facts of the case and to the parties than has Israeli law, the Court shall consider chiefly the tenor and purposes of the laws - Israeli and foreign - that are proposed to be applied, as they relate to the facts of the case and to the parties. For that purpose the Court shall take into account such factors as:
 - 1. The place where the injury occurred;
 - 2. The place where the conduct causing the injury occurred; and
 - 3. The domicil, residence, nationality place of incorporation and place of business of the parties.

3. Foreign Law Referring to Another Law

If a court decides to apply foreign law as aforesaid, and it finds that such law would refer to the law of any other jurisdiction, the Court shall not heed any such reference.

4. Pleading and Proof of Foreign Law

- (a) A party seeking to displace Israeli law by foreign law as aforesaid, shall bear the onus of proving the tenor of the foreign law and of convincing the court that, as to the issue or matter at bar, the foreign law has a closer relationship to the facts of the case and to the parties than has Israeli law.
 - (b) A plea regarding the displacement of Israeli law by foreign law shall be raised by an interested party in his pleadings, and shall be considered and resolved by the Court in a preliminary hearing.
-

The court may allow a party to raise a plea as aforesaid even at a later stage in the proceedings, and it may also postpone its decision in that matter until a later stage in the proceedings, provided that the rights of the other party or parties are not prejudiced.

- (c) The tenor and purpose of foreign law shall be proved by means of oral testimony or affidavit given by an expert in that law. The court may prescribe other or additional means of proof, if it deems such means appropriate in the circumstances.

5. Application of Local Law in Matters of Procedure and Evidence

The Court shall always apply Israeli law in matters of procedure and evidence.

6. Foreign Law Not to be Applied

The Court shall not apply foreign law which discriminates on grounds of sex, race, religion or ethnic origin or which is repugnant to public policy in Israel."

The Draft attempts to resolve the choice of law dilemma by a general rule, the *lex fori*, with a proper law type of exception. The following criticisms of the Draft may be made.

1. Section 2 appears to be an unfortunate attempt to condense paragraphs 6 and 145 of the American Restatement, Second. The *lex fori* is not to be displaced unless the foreign law has a "closer relationship" (s.2(a)) to the facts and parties. In deciding this the court "shall consider chiefly the tenor and purpose of the laws ... that are proposed to be applied (S.2(b)). However the purpose of any particular law does not relate to or assist the court in determining which law has a closer connection. Secondly the factors listed in S.2(b)1,2,3. which are of assistance in
-

determining the closer relationship are, on a literal reading, to be used as a guide to deciding the "tenor and purpose of the laws."

2. It seems unsatisfactory to adopt sub-paragraphs 2 (a), (b) and (c) of paragraph 145 of the American Restatement, Second, in in S.2(b) 1, 2 and 3 of the Draft but for no apparent reason to ignore sub-paragraph (d) of paragraph 145.
3. The lex fori is not to be displaced unless the court is "convinced" (s.2) that the foreign law has a closer relationship and the onus of "convincing" the Court is on the party seeking to rely on the foreign law (s.4). The problem is what degree of convincing is necessary.
4. S.5 could lead to problems of classification. As the House of Lords decision in Boys v. Chaplin illustrates it is not always an easy matter to determine whether a matter is procedural or substantive.¹⁾

By way of conclusion it may be noted that added to the problems in the legislation outlined above is the question of codification.²⁾

1) [1971] A.C. 356 and see North & Webb. Foreign Torts and English Courts: The effect of Chaplin v. Boys 19 I.C.L.Q. 24 at pp.32-33 (1970)

2) By codification is meant "the process whereby conflicting rules of two or more systems of law are replaced by a single rule common to all systems" See H.C. Gutteridge The Codification of Private International Law 1951 p.5 et.seq. (hereinafter referred to as Gutteridge.)

It is not appropriate to discuss in any detail the problems associated with codification generally or for international torts or accidents in particular. Suffice to say that the problems involved are numerous and varied and may arise because of the political, social or economic conditions of the age. If codification has for the most part been "... a sombre record of failure .. "1) the general opinion of academic writers²⁾ is that codification or unification should be regarded as a more than "mere pious aspiration"³⁾. It is a goal to aim for, a long range project.⁴⁾

0-0-0-0-0

1) Ibid, p.10

2) See Morse, p.321 et.seq. Gutteridge p.5 et.seq. Shapira p.237 Torts in Private International Law (1978)

3) Gutteridge p.5

4) Gutteridge pp.56-60 suggests that once international agreement is reached a short unifying convention should be all that is required. Problems of interpretation, which would inevitably arise could possibly be determined by the International Court of Justice. He suggests that partial codification is more likely to succeed in the long term.

PART C

Introduction

"The ideal is unattainable. All ideals are. Never shall we see the day when all countries will apply the same law to the same situation. This does not mean we should give up perusing the ideal.." ¹⁾

With codification as the ultimate goal there is much to be said for national legislation in the immediate future. If states and countries enacted statutes on the choice of law for international accidents hopefully uniform rules of law would develop which would facilitate codification.

Following on from national legislation would be regional codification, all Phillips v. Eyre jurisdictions could amalgamate firstly with each other and then with all the Canadian Provinces and Civil Law jurisdictions or all the European Economic Community countries could amalgamate and so on. The legislation adopted by each jurisdiction would have to take cognizance of other states rules and states should legislate with other state's rules in mind and they should endeavour to legislate towards harmony of rules wherever possible.

Legislation is necessary because of:

1. The unsatisfactory present situation especially in Phillips v. Eyre jurisdictions.
2. The rising importance of international torts is

1) O. Kahn Freund. General Problems of Private International Law. p323 (1976)

increasing technological changes "Dangerous drugs can cause babies to be born without arms or legs thousands of miles from the laboratory where the drugs were made. Scotch whisky .. is sold all over the world. Unfair competition is no longer confined to a single country.."1)

Mass communication affects defamation cases, increasing numbers of people take to the road in motor vehicles and so on.

3. The decided lack of cases, especially in Phillips v. Eyre jurisdictions makes legislation necessary.

For example mass air disasters whilst devastating in their results occur relatively infrequently and it has been pointed out that air commerce does not produce a steady stream of passenger death claims to serve "as grist for the slow grinding mill of the common law process."2)

Furthermore the difficulties facing a plaintiff make it such that decided cases are not prolific. Once a conflict of laws issue is involved the case obviously becomes more complex and hence more costly. For a plaintiff

1) Morris, p.256

2) B.E. Haller. Death in the Air: Federal Regulation of Tort Liability a Must. 54 American Bar Association Journal (1968) 382 at p386.

to have the misfortune of suing in a Phillips v. Eyre jurisdiction the requirement of double actionability compounds the problem.

Before outlining a Draft Bill for New Zealand or possibly for all Phillips v. Eyre jurisdictions it is proposed to briefly outline the possible choices that such legislation could take.

Possible Choices:

1. The first choice is between a Draft Bill for all torts or a series of Draft Bills for specific torts.
2. The second choice relates to the rule to be adopted; various possibilities present themselves here:-
 - a) One general rule with no exceptions
e.g. Article 25 of the Preliminary Dispositions of the Code of Civil Procedure of 1942.¹⁾
the general rule could be:-
 - (i) the lex fori - This denies the problem of choice of law.
 - (ii) the lex loci delicti commissi - eg. Article 25 Italy²⁾ if this is chosen then the place of commission of the tort can be
 - a) left undetermined
 - b) the place of acting
 - c) the place of harm

1) Supra at p.73

2) Ibid.

d) By election

e) the place of the substance of the wrongdoing.

- iii) A combination of the lex fori and lex loci delicti commissi (however determined) eg the traditional English approach as regarded in some jurisdictions. The disadvantages of such a rule are set out above.¹⁾
- iv) The Proper Law of the Tort eg. Clause I of the Draft Foreign Torts Act (Canada)²⁾
- v) Governmental Interest Analysis eg. Clause 3 of the Draft Foreign Torts Act (Canada)³⁾

B. A General Rule with Exceptions

The general rules in A.(i) - (iii) can have by way of exception A.(iv) thus:-

- i) The lex fori plus a proper law exception eg. Shapira's Bill.⁴⁾
- ii) the lex loci delicti commissi plus a proper law exception eg. the E.E.C. Draft.⁵⁾
- iii) the lex fori and lex loci delicti commissi plus a proper law exception eg. English Court of Appeals approach in Church of Scientology of California v. Commissioner of Police for the Metropolis.⁶⁾

1) Supra at p. 14 et.seq.

2) Supra at p. 73 note 2

3) Supra at p. 73 note 2

4) Supra at p. 74 note 2

5) Supra at p. 73 note 1

6) (1976) 120 Sol.J.690

iv) Further, where legislation is concerned with specific torts other exceptions could be evoked as an exception or adopted as a general rule. eg.

- lex loci delicti commissi plus state of registration
- state of parties habitual residence
eg the Hague Convention on the Law Applicable to Traffic Accidents 1968¹⁾
- Law of the Garage
eg. proposed by Ehrenzweig & Jayme²⁾
for the Conflict of Laws of enterprise liability for automobile accidents.³⁾

v) Public policy could be a general exception for (A) and (B).

C. A general rule with more than one exception

eg. the lex loci delicti commissi plus both the state of registration and the state where the vehicle is habitually stationed.

eg. The Canadian Draft (Traffic Accidents) Act.⁴⁾

D. One general rule for torts and specific rules for specific torts within this.

eg. the approach of the American Restatement Second.

1) Supra at p. 73 note 3

2) Ehrenzweig & Jayme. Private International Law Vol.III (1977) p.60 et.seq.

3) Ibid

4) Supra at p.73 note 4

In making a choice consideration should be given to the following points.

1. With the ultimate goal being codification international harmony must be balanced against internal consistency. For this reason the proposed Bill should avoid reference to the concepts of domicile, nationality and habitual residence. Unification of Phillips v. Eyre jurisdictions with civil law countries would be facilitated if the domicile versus nationality controversy was avoided.
2. The proposed Bill should aim at a compromise between rigidity and flexibility. By the very nature of things legislative draftsmen cannot possibly anticipate all the potential mixed contingencies. A relatively short piece of legislation should be all that is required. This would allow for flexibility and would compliment the adoption of a specific basic rule which could otherwise tend to make for rigidity.
3. The Bill should aim at a compromise between justice in the individual case and certainty. Ease of application and predictability are also important factors in the field of conflict of laws.¹⁾

1) H.E. Read at p.294 in discussing the Draft Foreign Torts Act (Canada) quotes Chief Justice Kenison's judgment in Clark v. Clark (1966 222 A (2d) 205 where he said the goals were predictability of results (this protects the parties justifiable actions) uniformity of decision; the maintenance of reasonable orderliness and good relationship among states; simplification of the judicial task; the advancement of governmental interests and application of the better law.

Because of the wide variety of torts generally, the writer considers that legislation for certain torts only should be initially undertaken. With this in mind the following Draft Bill is proposed for accidents with an international element:-

A DRAFT BILL

1. When deciding the rights and liabilities of the parties with respect to an accident occurring wholly or partly outside New Zealand, a New Zealand court shall apply the law of the place where the conduct causing the harm occurred.
2. A reference to the laws of a state shall be read as a reference to its internal laws excluding the conflict rules.
3. The party seeking to displace the law of New Zealand by foreign law shall bear the onus of proving the foreign law.
4. The foreign law may be proved by means of oral testimony or affidavit given by an expert in that law. The court may prescribe other or additional means of proof if it deems such means appropriate in the circumstances.
5. The Court shall always apply the law of New Zealand to matters of procedure and evidence.
6. The court shall not apply foreign law which discriminates on grounds of sex, race, religion or ethnic origin or which is repugnant to public policy in New Zealand.

O-O-O

Section 2 is Article 1.(1)(2) of the Conditionally approved Draft of a Uniform Conflict of Laws (Traffic Accidents) Act¹⁾ whilst sections 3 and 4 are based on Shapira's Draft Bill Sections 4(a) and 4(c). Sections 5 and 6 correspond to Sections 5 and 6 of Shapira's Draft Bill.

The following points may be noted:-

1. Section 2 should overcome any possible problems of renvoi.
2. Section 6 provides a safety measure whereby the lex loci delicti can be avoided if necessary. In such a case the court could apply the lex fori or any other law. As such situations are likely to be rare it is considered preferable to leave the alternative or alternatives to the lex loci delicti open.
3. Although favoring the place of acting, Section 1 is not out of harmony with the Privy Council decision in the Distiller's²⁾ case as the answer to where, in substance did this cause of action arise should in most cases be the place where the conduct causing the harm occurred. In this context it should be noted that the use of the term 'conduct; is sufficiently general and that Section 1 refers to 'a tort' rather than 'an issue in tort' or 'an action in tort'.
4. The draft Bill makes no reference to questions of jurisdiction. The relevant rules in the Code of Civil Procedure in individual jurisdictions would obviously

1) See Appendix B.

2) Distillers Co. (Bio-Chemicals) Ltd. v Thompson
/1971/ All E.R. 694; /1971/ A.C. 458.

continue to apply. However no specific reference is made to the Phillips v. Eyre rule and its abolition as does the Tentative Draft of a Foreign Torts Act 1966 for Canada. Such a clause should perhaps be included in a Phillips v. Eyre jurisdiction such as New Zealand.

5. By adopting the *lex loci delicti commissi* rule critics of the Draft Bill would argue that flexibility and justice in the individual case has been sacrificed to the goals of certainty and predictability. Whilst the rule is in harmony with various jurisdictions¹⁾ and is therefore more readily acceptable to a number of jurisdictions its application to a number of decided cases indicates that the Draft Bill would work in practice.

The following cases have been chosen on the following criteria:-

- (a) They pertain to a variety of situations;
- (b) come from different jurisdictions;
- (c) where possible are controversial or much criticised;
- (d) have been referred to above;
- (e) have been considered by the highest court in the jurisdiction concerned.

1) Rabel Vol.2, pp. 235/6 lists the countries which use the *lex loci delicti* rule and see C.M. Semmler. The Foreign Party to an Auto Accident in the USSR: Calculation of Damages. 12 International Lawyer 505 at p.508 (1978). The Soviet view according to Semmler is that the *lex loci delicti* governs and it is defined as the place of the cause of injury.

The cases discussed are:-

1. In re Paris Air Crash of March 3, 1974
2. Hurtado v. Superior Court
3. Kieger c. Amigues
4. Boys v. Chaplin
5. M'Elroy v. M'Allister
6. La Van v. Danyluk
7. Anderson v. Eric Anderson Radio & T.V. Pty. Ltd.

1. In re Paris Air Crash of March 3, 1974¹⁾

On March 3, 1974, shortly after takeoff from Paris, France, a Douglas D.C.10 passenger aircraft owned and operated by Turkish Airlines crashed in France destroying the plane and killing all 346 occupants aboard. The defendants were the United States, two American manufacturers and Turk Hava Yollari A.O. whilst the deceased passengers were from 24 countries and 12 states of the United States, a total of 36 jurisdictions.

The defendants agreed to a formula amongst themselves that precluded litigation about liability and which left for settlement or trial only the issue of damages. Peirson M. Hall, Senior, District Judge of the District Court in California commenced his judgment on the choice of law applicable to damages by saying that the law here was "...a veritable jungle which, if the law can be found out, leads not to a 'rule of action' but a reign of chaos dominated in each case by the judge's 'informed guess' as to what some other state than the one in which he sits would hold the law to be."²⁾ He noted that various arguments had been advanced as to which law should be applied to damages and that these included the law of:

1. California; 2. domicile of decedents; 3. domicile of claimants; 4. France; Japan and 6. California plus French 'moral' damages.³⁾

1) 399F. Supp. 732 (C.D. Cal. 1975)

2) Ibid at p. 739

3) Ibid.

Of the 12 states of the United States involved some used the "significant contacts" approach, whilst others the place of the wrong rule. The measure of damages varied, "one state limited the amount to \$50,000 another to \$75,000; four allowed full recovery with varying limitations; one had full recovery plus pain and suffering and mental anguish..." 1)

The court discussed Forsyth v. Cessna Aircraft Co.²⁾ which had failed to take into consideration three important points, viz:

1. deterrance aspect;
2. The distinction between the place of wrong and that of the accident -

"...if the wrong is in defective design or manufacture, it occurred at the time and in the place of design and manufacture, the place where it came to fruition is purely fortuitous..."³⁾

3. The rights of the manufacturer. Applying Forsyth v. Cessna Aircraft Co. to the present facts would result in application of French law which the Court thought an "undesirable result".⁴⁾

The Court then went on to note that California had adopted the governmental interest approach as its choice of law rule.⁵⁾ It was held that the interests of

1) Ibid at p. 742

2) 520 F. 2d. 608 and ibid at p.740

3) Ibid

4) Ibid

5) A.A. Ehrenzweig & E. Jayme. Private International Law Vol.III (1977) at p.166 suggests (whilst emphasising their lex fori views) that the Court merely paid lip service to the Governmental-interest doctrine.

the United States and the State of California were significantly greater than the interest of countries or states of which either the victims or claimants were citizens. The plane was designed, constructed, manufactured and tested in California (where the alleged negligence had occurred) and the United States had issued a Certificate of Airworthiness so both had a significant interest in seeing Californian law applied. California was held to be

"... mainly interested in deterring conduct of its defendants, 2. avoiding the imposition of excess financial burdens on its resident defendants and 3. providing a uniform rule of liability and damages to those who come under the ambit of California's strict product liability law and market their product outside California ... may know what risks they are subject to when they make and sell their products..."¹⁾

California law would also be applied to the issue of damages (and liability) if the Draft Bill was applied. The *lex loci delicti* would be Californian law. The place of acting would not be in France but in California where the alleged negligence had occurred. This would be an acceptable result in the writer's opinion for the following reasons:

1. In mass accidents the magnitude of the problem is such that certainty, predictability, ease of application are vital, as justice to the victims dependants as a group, requires that they receive prompt compensation.

1) 399 F. Supp. 732 at p.743.

Speed of process is required and this is achieved if everyone knows what law will be applied as soon as the accident occurs. The place of acting rule is certain. This may be arbitrary but it is more satisfactory to the group of dependants as a whole.

2. It is probable that justice to each individual victim's family is an impossibility by all standards anyway. Should for example, the victims dependants or heirs be treated identically if they (the victims) die in the same accident or do the heirs of a victim from a country with a low standard of living and/or a low upper limit on damages recoverable receive less by having their law applied, or should the families of two victims from the same country, one accustomed to a high standard of living and the other a low receive the same amount of damages? Allen¹⁾ for example says "...the system, which permits (the plaintiff) to do better in the courts of a foreign country is plainly wrong, or at best illogical." and argues that compensation should be determined here by the country which determines the passengers personal living standards.

3. The problems involved above are magnified when one considers for example case No. CV 75-255-PH discussed by the judge in the Paris Air Crash case.

1) J.V. Allen. Air Disasters. The Case of Rationalization. 43 Journal of Air Law and Commerce. pp.555-64 esp. p.558 (hereinafter cited as Allen)

"... the heirs are alleged, at the time of the crash, to be citizens and domiciliaries distributed among four countries, viz. France, United Kingdom, Morocco and Israel. This is not the only case with such a divergence, which produces an unanswerable enigma. If the law of damages of each country controlled, i.e. if the one country (or state) beneficiaries are limited to linear descendants, in another they may be lateral descendants and in another they may be dependants regardless of blood affinity, and if one country (or state) limited damages, another imposed a penal fine ... the result would be chaotic, and against the faintest instinct for justice by unequal results to those standing in the same relationship to each other and to the decedent."1)

4. The alternatives to the place of acting rule do not yield a more satisfactory result on the facts of the case. The alternatives suggested all have disadvantages:-

- (a) domicile of decedents and domicile of claimants.
This would be too complex to provide a workable solution, as (3) above illustrates.
- (b) France. On the facts of the case the fact that the accident occurred in France was purely fortuitous.
- (c) Japan. An arbitrary choice.
- (d) California and French 'moral' damages. as for (b) above.

On the other hand there are no objections on policy grounds for not applying the Californian rule. Californian defendants would be deterred from negligence and so on. Finally adequate compensation should be awarded

1) 399 F. Supp. 732 at p. 741

due to the wording of the Californian rule itself, which provides that the heirs of the decedent are entitled to recover such sum, as under all the circumstances of the case, will be just compensation for the pecuniary loss which each heir has suffered by reason of the death of the decedent.¹⁾

5. The law of California will be applied under the Draft Bill no matter where the forum, whilst in the case itself the fact that the forum was California was not without significance.

6. Governmental interest analysis may have worked satisfactorily in the Paris Air Crash case fact situation but its application to a slightly altered fact situation is significantly more difficult. If 346 persons died on March 3, 1974 due to the negligence of the pilot then California has no obvious interest in applying its law other than the fact that it is the forum. Turkey however would have an interest from the deterrant point of view in applying its law to a negligent turkish pilot; France would either be seen as uninterested, the place of injury being fortuitous again or it might be argued it was as interested as Turkey in deterring negligence within its borders. Thirty-six jurisdictions would also be interested in seeing that its deceased's dependants and heirs were adequately

1) Californian Code of Civ. Proc. S.377 set out in Hurtado v. Superior Court 522 P.2d.666 at p.669

and quickly provided for. In other words governmental interest analysis would fail on the grounds of lack of predictability. The Draft Bill in such a fact situation would apply French law. Arbitrary perhaps but predictable, and not unjust.¹⁾

If the Draft Bill was applied to the Mt. Erebus air disaster case New Zealand law would apply. This is so if it were to be alleged that the accident resulted from pilot error in the Ross Dependency or because of New Zealand Airlines procedures within New Zealand itself.²⁾ (Governmental interest analysis, would probably yield the same result.)

By way of conclusion it should be noted that many feel that mass accidents resulting from aircraft disasters is a fit subject for specific legislation.³⁾ Allen suggests that existing conventions such as the Warsaw Convention (which was held inapplicable in the Paris Air Crash Case)⁴⁾ be abolished and that an International Civil Aviation Organisation (I.C.A.O.) Convention be entered into by all nations with major airlines. The Convention would totally regulate the financial consequences of air disasters. As this regulation would not be achieved for many years Allen⁵⁾ suggests that as an interim

1) It is arguable that on these facts whichever approach is adopted will produce an arbitrary result.

2) Assuming the Ross Dependency is accepted as New Zealand Territory.

3) See Allen at p.559 and B.E. Haller. Death in the Air. 54 Am. Bar Assn. Jo. 382 (1968).

4) 399 F. Supp. 732 (1975) at p. 747. The Warsaw Convention 1929, as amended, relating to international air transport is printed in English in 5 Am.Jo. of Comp. Law 90 (1956)

5) Allen at p.559

solution the major commercial aviation nations of the world, evolve, on a country by country basis an equivalent solution subject only to differing national legal and procedural requirements. Allen's solution would provide automatic compensation without proof of fault with a set upper limit. To this on proof of loss a further sum could be awarded. Allen leaves open the question of whether proof of fault should be established here.¹⁾

Until such time as special legislation is adopted to cope with mass accidents the Draft Bill would provide an adequate solution.

1)&Haller op.cit. supra at p.128 note 3 at p.386. Haller in discussing the requirements of a proposed Federal Statute for the United States is against a fixed dollar limitation. Obviously any statute or convention imposing a fixed upper limit would have to provide a means for increasing the sum.

2. Hurtado v. Superior Court of Sacramento County¹⁾

This was an action for damages for wrongful death arising out of a motor vehicle accident in California. Hurtado, a mexican, was a passenger in his cousins car which hit a parked truck. The truck in turn collided with a parked car in which was the truck owners son. All three vehicles were registered in California and everyone concerned except the deceased were residents of California. Californian law had no upper limit on the amount of damages available whilst Mexico's upper limit was, in U.S. dollars \$1,946.72.

Sullivan J. having pointed out that the objective of governmental interest analysis is "to determine the law that most appropriately applies to the issue involved."²⁾ noted that the interest of a state in a tort rule limiting damages for wrongful death is to 'protect defendants from excessive financial burdens or exaggerated claims.'³⁾ California applies its own law unless mexico has an interest in having its measure of damages applied.

Mexico having no interest in seeing California's defendants protected, California law was applied. Sullivan J. then went on to discuss, obiter, various arguments advanced by the defendants pertaining to governmental interest analysis.

1) 11 Cal 3d. 574, 522 p 2d. 666, 114 Cal.Rptr.106 (1974)

2) 522 p. 2d. 666 at p. 669

3) Ibid

Applying the Draft Bill to the facts above Californian law would be applied, indeed there seems to be no other law that, on the facts, could possibly be used. It would be within the defendants expectations to have Californian law applied as of the four persons involved three were Californians acting in their own state in Californian registered vehicles. No injustice results to the deceased mexican's family. Maria de Jesus Flores de Hurtado and her children would receive "... such damages ... as may be just ..." ¹⁾ rather than 25 pesos per day for 730 days, ²⁾ which, assuming a large number of young Hurtados could be something of a blessing.

1) Cal.C.C.P. 377

2) 522 p 2d. 666 at p.668 note 1.

3. Keiger c. Amigues 1)

In 1961 the case of Kieger c. Amigues was started in the French courts. A frenchman driving on a German road attempted to overtake a truck in heavy traffic. A driver coming from the opposite direction, also a frenchman, was forced to brake suddenly and collided with a truck. He was injured and his brother, who was a passenger in the car, died in the accident. The father sued for damages for mental suffering and pecuniary loss resulting from the death of his son. Under French law such damages can be granted.

The court of first instance held in favor of the plaintiff and allowed damages for mental suffering although under German law this was not available. The court emphasised the nationality of the parties; the Court of Appeal rejected the nationality argument but allowed the decision on the grounds of French public policy. The fact that German law did not permit compensation for mental suffering was, the court held, contrary to French public policy.

Appeal was taken to the Court of Cassation which reversed the Court of Appeal's decision and held:-

1) Cour de Cassation, Chambre Civile (1967) Recueil Dalloz sirey 38^e Cahier 629 (1967) Revue Critique de droit international prive v.56 (1967) 728. Bulletin des arrêts de la cour de Cassation (1967) 137 No. 189

"Attendu que, quelle que soit la nationalité des parties, la loi, compétente pour régir la responsabilité extra-contractuelle est la loi du lieu où le fait dommageable s'est produit.."1)

It may be noted that there is no provision in the French Civil Code which requires the application of the *lex loci delicti* to foreign torts. The proposition was only settled in 1948 by the decision of the Cour de Cassation in Latour c. Guiraud.²⁾

The third case in the trilogy is Thomas c. Erste Allgemeine decided in 1969.³⁾ In all three cases the parties were french and the accident occurred in other European countries; Germany, Spain and Austria. In all three cases the *lex loci delicti* was applied and in each case the final solution worked to the detriment of the victims interests, who, had the accident occurred in France would have received full compensation.

What makes the trilogy of great interest is that the fact situations are the same as that in Boys v. Chaplin⁴⁾ in so far as the parties were both french/English and the accident happened outside the forum and in particular the issue in Kieger c. Amigues was "... precisely the same as in Chaplin v. Boys decided by the House of

1) *ibid.* "Whatever the nationality of the parties, the law applicable to tort liability is the law of the place in which the tort is committed." Writer's translation.

2) Cour de Cassation. *Sirey* (1949) 1.21. *Chambre Civile* (1948) *Dalloz* 357 (1949) *Revue Critique* 89 (1949)

3) Cass May 30, 1967, *Journal du Droit International* 1967 622, *Revue Critique de droit International Prive* 1967 728. *Recueil Dalloz* 1967, 629.

4) /1971/ *A.C.* 356

Lords two years later, but with a different and better result."¹⁾

Delaume²⁾ discussing all three french cases says:

"Though the secrecy surrounding the making of French judgments does not permit more than the formulation of a purely speculative guess it is not inconceivable that in reaching its decision, the Court considered that, because of the French nationality of both sides, the subjective interests of the parties did in effect cancel each other out since whatever law was applied, whether the *lex loci* or the *lex fori*, a Frenchman would suffer the consequences."³⁾

Another reason for retaining the *lex loci* rule in all three cases according to Delaume is the fact that compensation for mental suffering is under heavy attack in France, and that "the forum's (France) own system might not be so firmly rooted as to justify invoking public policy against foreign laws accomplishing in effect what a vocal segment of French legal opinion is advocating." ⁴⁾

Both Kieger and Thomas were decided in full knowledge of the work of the Hague Conference.⁵⁾ It is therefore a cause of particular regret that the French system of judgments and of reporting cases is such that one is unable to discover the reasons why the Cour de Cassation comes to the decisions it does.

1) Morris, p. 273

2) G.R. Delaume. Recent French Decisions. 18 Am.J.Comp. Law 1 (1971) at p.10.

3) Ibid

4) Ibid

5) Ibid

In the notes accompanying the Dalloz Sirey report of Kieger, Professor Malaurie¹⁾ makes reference to the most significant relationship test and says:

"Une telle complication serait contraire à l'esprit juridique français pour lequel la vérité et la justice se trouvent dans la simplicité".

The Draft Bill conforms with the French spirit of simplicity and in the three cases above the *lex loci* would apply and the same result would be achieved as in fact occurred. The french father of the deceased in Kieger would not be able to recover for mental suffering. In Latour c. Guiraud²⁾ the french widow would have to prove fault or negligence and in Thomas c. Erste Allgemeine³⁾ the Austrian *lex loci* would apply. The result in Latour c. Guiraud would be such that the widow would not be able to recover as it was impossible to prove negligence.⁴⁾

Briefly the facts were that a convey of trucks were conveying oil and other supplies to the Republican Government during the Spanish Civil War. In Spain one french truck, driven by a frenchman collided with a Spanish railway engine and exploded; the plaintiff's husband, also French and driving another French truck in the Convoy was killed. Both drivers were employed by French firms

1) Professor P. Malaurie, p. 630

2) Cour de Cassation, Chambre Civile (1948) Dalloz 357 (1949) Sirey 1.21 (1949) Revue Critique 89.

3) Cour de Cassation. December 15, 1969. Dalloz 87 (1970)

4) See Morris, p. 272-3.

and Morris¹⁾ says there was nothing to indicate that they knew each other personally. Morris²⁾ concludes that as the case turned on the standard of liability, the *lex loci delicti* had a stronger claim to regulate.

In the Thomas case, a Frenchman was on a conducted tour in Austria when he was injured by a vehicle driven by another Frenchman. There was no fault on the part of the travel agency. The Austrian law only allowed compensation for non-economic losses in cases of wilful misconduct or gross negligence which, in the case, was not established.

The Draft Bill would produce the same results as those arrived at by the Cour de Cassation. No injustice results, it was fortuitous that both parties in all cases were french, it would have been much more likely that either the frenchman acting or the victims had been German Spanish or Austrian. The Draft Bill produces the same result as the most significant relationship test (in the writers opinion). In none of the cases did the parties know each other³⁾ in France, so there would be no personal relationship between them centred in France so the most significant law is, perhaps by default, the *lex loci delicti*.

1) Ibid

2) Morris, p.273-4

3) Except perhaps in Latour the drivers might have got to know each other driving the convoy but even so there is no evidence they knew each other before the convoy set off. See Morris p.273-4.

4. Boys v Chaplin¹⁾

As noted above this was a House of Lords decision involving members of her Majesty's Armed Forces. David Boys sustained serious injuries in a road accident in Malta caused by the negligence of Richard Chaplin. The issue before the House of Lords was what law was to be applied in determining the heads or measure of damages to be awarded to the plaintiff. As in the three Court of Cassation cases the *lex loci delicti* was less favourable to the victim than the forum. David Boys could recover £53 as special damages if Maltese law were to apply whilst by English law the sum would have been £2,303; as by English law recovery is possible for pain and suffering.

Following a bewildering variety of approaches in the judgments Boys ended up with £2,303.²⁾

The Draft Bill would allow him £53.

Before sympathising with Boys it may be noted that the Royal Air Force continued to pay him his full pay as a Serviceman until he was discharged and he obtained a better paid post in civilian life than that which he had had in the services.³⁾

1) [1967] 2 All E.R. 665, [1968] 2 Q.B.1, [1968] 1 All E.R. 283, [1968] 2 W.L.R. 328, [1969] 3 W.L.R. 322, [1969] 2 All E.R. 1085

2) Supra at p. 27 et. seq.

3) See P.M. North & P.R.H. Webb. Foreign Torts and English Courts: The effect of Chaplin v. Boys. 19 I.C.L.Q. 24 (1970) at p.24

Arguments in favor of the Draft Bill's application of the *lex loci delicti*, that is Maltese law, may be summarised as follows:-

1. The confusion and difficulties of the present English law is avoided.

"...It is extremely difficult to state with any degree of precision what is now the English choice of law rule where a tort has been committed abroad."¹⁾

2. The differences of opinion as to what is the proper law is circumvented. Lord Denning M.R. in the Court of Appeal held English law to be the proper law whilst Pearl²⁾ argues "the proper law of the tort should be the *lex loci* on the simple ground that when foreigners drive on strange roads, they are impliedly bound by the criminal and the civil laws as well as the administrative regulations of the *lex loci*, unless a special contractual relationship such as carrier and passenger can be imposed by another legal system..." Morris³⁾ is ambiguous, he says after discussing Kieger c. Amigues that "...that issue was precisely the same as in Chaplin v. Boys, decided by the House of Lords two years later, but with a different and better result." It is arguable he is meaning that the Kieger result is the better result in which case he would presumably apply Maltese law as the proper law.

1) North & Webb op.cit. supra at p. 137 note 3 at p.24

2) D. Pearl. Camb. Law Jo. 219 at p.222 (1968)

3) Morris at p.273

3. Applying the *lex loci* to the facts in Boys v. Chaplin works no injustice to the parties. One can argue it is fortuitous that the accident occurred in Malta but it is equally arguable that it was fortuitous that a negligent Englishman happened to injure another Englishman rather than a Maltese. Both were off duty; there is no evidence that they knew each other (one was in the Air Force the other the Army). It is arguable that the parties would expect Maltese law to apply.

4. Certainty, predictability and ease of application are achieved.

5. Uniformity of results are also a result of applying the *lex loci*. Thus if Chaplin had injured a Maltese in Malta Maltese law would apply, likewise if he had injured a New Zealander or Arab Maltese law would apply. Under the present English rule different laws might be applied (especially if Boys had been Maltese).

6. The results would be in harmony with the French Cour de Cassation decisions.

7. With road accidents in general the parties actions are judged against the local situation. Negligence is determined with reference to the local laws on speed, left hand/right hand side of the road rule and so on. It is logical that the local law determines the issue of negligence and other issues such as heads of damage and so on.

5. M'Elroy v. M'Allister¹⁾

M'Elroy, a Glasgow resident, was travelling in a truck during the course of his employment. He was employed by a Glasgow company and the driver of the truck, a fellow employee, also lived in Glasgow. In Westmorland, M'Allister, the driver, negligently collided with a heavy sheep truck. M'Elroy was killed in the collision.

By a special court of seven judges the Court of Session in Scotland held that M'Elroy's widow could recover £40 for funeral expenses and nothing else. The pursuer's first claim had been for solatium. Had the accident occurred in Scotland she would have been entitled to a substantial sum under this head. However the claim for solatium failed because it was a substantive and independant right of action and not a mere item in a damages claim and was not recognised by the English law, the *lex loci delicti*.

The pursuer's second claim, for loss of her breadwinner, was based on the English Fatal Accidents Act. Had the action been brought in England she would have been able to recover substantial damages here. However the claim failed because the action was begun more than twelve months after the accident contrary to

1) 1949 S.C.110

Section 3 of the Act of 1846.

Finally the widow claimed pursuant to the Law Reform (Miscellaneous Provisions) Act 1934 for loss of the deceased's expectation of life. The widow was suing here as executrix-dative. This claim also failed because pursuant to Scots law all rights of action for personal injuries due to negligence die with the injured person, and therefore the wrong was not actionable by the *lex fori*.

Lord Keith dissented on both the last two claims and said:

"...The present case is a typical case where insistence on the double rule enunciated by Willes J. may work injustice."¹⁾

This much discussed and criticised case led Morris to develop his proper law theory. He says:

"...It was surely far more significant that the parties were resident in Glasgow, that the fatal trip began in Scotland, and that the pursuer's husband was a passenger in a lorry and not, e.g. a pedestrian on the highway. The parties were thus socially insulated from their geographical environment in England. It would have been more sensible for the Court of Session to have disregarded English law entirely, and to have applied Scots law as the proper law of the tort."

The pursuer's failure pursuant to the Fatal Accidents Act cannot be blamed on the choice of law

1) 1949 S.C. 110 at p.132

2) Morris at p. 254

applied but to a misfortune unrelated to the problem. Had all the persons involved been English and the accident been in England the widow would have failed under the English Acts if she had been out of time; because the case involved conflict of laws is no reason to treat the widow differently.

On applying the Draft Bill the widow would be able to claim substantial damages under the English Fatal Accidents Act as English law as the *lex loci delicti* would be applied. If she failed to bring her action within the requisite time period that is misfortunate but it is hardly a ground for departing from the *lex loci delicti* as the rule.

It is arguable that it is fairer to apply the same law to all accidents in Westmorland as this makes for certainty and predictability etc. Morris' Proper Law exception may work on the actual facts of the case but if his approach was adopted as the basic rule problems would arise as to when the elements ceased to be sufficiently Scottish to warrant the application of Scottish law. Would the negligence of the English sheep truck driver rather than the Scottish M'Allister have been enough to apply English law? The Draft Bill is adequate for the facts of M'Elroy v. M'Allister.

The defendant was speeding - a punishable offence by the law of Washington and negligent by the law of British Columbia.¹⁾

"...Both branches of the test I must apply are satisfied, and therefore the law of this province applies..."²⁾

However Kirke Smith J. continues by saying

"I confess to having been deeply concerned in arriving at this conclusion, for although it accords both with the authorities binding on me, ... and also with the "proper law of the tort" concept ... it clashes with the view expressed by the majority of the House of Lords in the Chaplin case... contributory negligence ... by Washington law ... is a complete bar to (an) action for damages ... the defendant drivers contributory negligence is therefore by Washington law, not actionable, and it follows that the plaintiff's action could not be maintained in the courts of that state or this province."

Kirke Smith J. concludes that the practical result of the case is satisfactory (his concern being for the state of the law) and British Columbia law is applied to both the issues of liability and quantum.

The Draft Bill would apply the *lex loci delicti* and as contributory negligence is a complete bar to an action the plaintiff would fail when Washington law was applied. In other words the result would be the same as that which would result if Boys v.

1) Ibid

2) (1970) 75 W.W.R. 500 at p.502

Chaplin¹⁾ was applied as interpreted by Kirke Smith J.

Although British Columbia law would apply as the 'proper law' no particular injustice results on the actual facts of the case if the Draft Bill is applied. The plaintiff was one of five young people in a motor vehicle that had run out of petrol. Two went off to try and find petrol whilst the remaining three started to push the car. The defendant's car skidded into the vehicle killing one person and injuring the plaintiff. The Draft Bill's advantage is that it produces a certain result and is easy to apply even if the facts are altered. If Mrs. Danyluk had been from a third state then the proper law would be less obvious and no matter who the occupants of the plaintiffs vehicle are Washington law is going to apply rather than some possibly fortuitous law of the forum. The Draft Bill would produce a more satisfactory result if Mrs. Danyluk had been resident and domiciled in Washington with assets in British Columbia. In such a case an application of Washington law would accord with the reasonable expectations of the Danyluks. From the plaintiffs point of view the result achieved by the Draft Bill is no harsher than the application of Boys v. Chaplin²⁾ itself and he could presumably have taken out

1) [1971] A.C. 356

2) [1971] A.C. 356

the necessary insurance before leaving his own state.

Further the Draft Bill avoids the artificiality that the existing law produces in such situations. This is well illustrated by McLean v. Pettigrew¹⁾ itself. The facts were similar to La Van v. Danyluk and Danyluk - the parties were from the forum state and the effect of the *lex loci delicti* was to deny the plaintiff a remedy.²⁾ Taschereau J. after establishing the unambiguity of the relevant legislation proceeded to find both limbs of Phillips v. Eyre³⁾ satisfied and thus the plaintiff could succeed. What was in fact neither a crime or a tort in Ontario was converted into a tort by the law of Quebec.

1) [1945] 2 D.L.R. 65

2) The plaintiff and defendant were both domiciled in Quebec. On a journey to Ottawa the plaintiff who was a gratuitous passenger in the defendants vehicle was injured in Ontario. Section 47 of the Ontario Highway Traffic Act specifically held that an owner or driver of a motor vehicle could not be liable in such a situation. See p. 78 of the Report.

3) (1870) L.R. 6 Q.B. 1

7. Anderson v. Eric Anderson Radio & T.V. Pty. Ltd.¹⁾

The appellant was injured in a motor vehicle accident in the Australian Capital Territory. The trial judge in New South Wales held that the substantive law which he was bound to apply was the law of the Australian Capital Territory.

The Supreme Court of New South Wales held that the law of New South Wales should have been applied. In the High Court of Australia Barwick C.J. held that the trial judge should have ascertained the law of the Australian Capital Territory.

"...not to apply it, but in order to determine as a fact in applying the law of New South Wales to the case in hand what the law of the Australian Capital Territory provided as to whether or not the act there committed was or was not there 'justifiable'"²⁾

Kitto J. held that there was no actionable wrong and therefore the plaintiff would fail under the first limb of Phillips v. Eyre.³⁾ Because contributory negligence is a good defence in New South Wales, the forum, the wrong complained of would not have been actionable if it happened in New South Wales.

Windeyer J. said:

1) [1965] 114 C.L.R. 20

2) Ibid at p.24

3) (1870) L.R. 6 Q.B. 1 at pp.28-29

"...the rules applicable are derived from the well-known statement of Willes J. in Phillips v. Eyre concerning the jurisdiction¹⁾ of English Courts in cases concerning foreign courts..."²⁾

With regards the first limb, Windeyer J. notes that one can have a good cause of action even though some matter exists which would defeat it.³⁾

Once the jurisdictional limbs are satisfied authority shows that the court must "...decide the rights of the parties as it would in an action based on a similar event occurring within its own borders..."⁴⁾ Thus for Windeyer J. the plaintiff or appellant gets over the two limbs but on having the *lex fori* applied fails because of the contributory negligence.

On the particular facts Kitto J. and Windeyer J. come to the same result; but different results could be obtained by altering the facts; a clearly unsatisfactory state of affairs.

The problems discussed by the High Court are avoided by application of the *lex loci delicti* and the victim would be compensated after account was taken for his contributory negligence. Again consistency of results would be achieved and the difficulties

1) Emphasis added.

2) Ibid at p. 40

3) Ibid at p. 41

4) p.42 and see P.M. North. *Contributory Negligence & The Conflict of Laws* 16 I.C.L.Q. 379 esp. pp.384-392 (1967)

of firstly succeeding in New South Wales only to then fail are avoided.

The problem of determining the 'proper law' is also avoided. North¹⁾ notes that the actual facts of the case 'pose a nice problem for determining the proper law of this tort.'²⁾

1) Ibid at p.384 note 27.

2) The accident occurred in the Australian Capital Territory where the defendants carried on business. The forum New South Wales was where the plaintiff resided and where the defendant company was incorporated and carried on business. The defendant's employee resided and worked in the Australian Capital Territory.

Cavers¹⁾ in criticising The Hague Convention on The Law Applicable to Traffic Accidents 1968 gives hypothetical examples to illustrate how the convention could produce arbitrary results. Two of these examples are given above.²⁾ It is proposed to apply the Draft Bill to these situations to see if the Draft Bill would produce a more satisfactory solution in each case. Cavers seems to suggest that the arbitrary results are produced because of the pursuit by the Convention for ease of application and certainty³⁾. As this is the type of criticism frequently applied to those favoring one specific rule it is of importance that the Draft Bill should work well in the following situations:

1. Two Danes rent a car in Amsterdam and have an accident in Paris. By Article 4 of the above Convention Dutch law applies rather than Danish law. Cavers⁴⁾ notes that some of the Delegates to the Convention remarked that it seemed strange that Dutch law should apply rather than the law of the parties habitual residence. (The draft Convention had reflected the view that such common habitual residence

1) D.F. Cavers. Legislative Choice of Law: Some European Examples. 44 So. Calif. Law Rev. 340 (1971) (hereinafter cited as Cavers)

2) Supra at p. 85

3) Cavers at p. 356

4) Ibid at p. 357

was the most significant contact).¹⁾

There are however three possible choices of law here; Dutch, Danish or French law could conceivably be applied.

The Draft Bill would apply French law as the *lex loci delicti*.²⁾

The advantages of applying French law rather than Danish or Dutch law in this fact situation are:

- (a) The problems associated with "habitual residence" are avoided. If Danish law is to be applied then the court has to determine questions of "habitual residence", application of the *lex loci delicti* avoids this problem altogether and thereby avoids the problems in choosing between such concepts as 'habitual residence' 'nationality' and 'domicile'. Whilst in some cases the two Danes might be clearly domiciled/habitually resident in Denmark borderline cases could obviously arise. Secondly it is arbitrary to decide that habitual residence is the most significant contact which must be argued if Danish law is

1) See Cavers at p.357

2) Assuming that the accident resulted from the negligence of the driver rather than from any defect in the motor vehicle. If the accident had resulted from a defect in the motor vehicle then the place of acting would have been the place where that defect happened - the place of manufacture etc. See In re Paris Air Crash discussed supra at p121 et.seq.

to be applied.

- (b) To apply Dutch law requires emphasis on the place of registration which as Caver's illustration shows can be purely arbitrary or fortuitous. Further problems could arise in this connection where a vehicle is registered in more than one state or country or is not registered at all.
 - (c) The application of French law is, on the facts, no more arbitrary than either Danish or Dutch law. One can in fact argue that French law would be the Proper Law. Pearl's arguments could be evoked.¹⁾ Uniformity of results would be achieved if French law was applied and uniformity leads to predictability.
2. A German in a German registered motor vehicle invites an Englishman whose acquaintance he has made in Paris to drive to the airport with him. The Englishman is killed in a one vehicle crash. The Convention restricts the Englishman's family to the level of recovery permitted by German Law which is lower than that allowed by either French or English Law.

1) Cavers, at p.357 and see Pearl op.cit. supra at p.138

Cavers says that the Convention would not deprive a French passenger in the same car of the French standard of financial protection and that "there appears no good reason to deny equal treatment to the Englishman".¹⁾

Applying the Draft Bill French Law is applied no matter who the German chooses to take to the airport, and thus Cavers criticism is avoided. The problems of passengers with habitual residences/dual nationalities, a different nationality or domicile to their habitual residence are also avoided as are complications which could occur if the German took more than one passenger to the airport.

3. "A German driver loses control of his German registered car and runs into a queue of Frenchmen waiting for a bus in Paris. Several are killed. One of them had his habitual residence in Germany. His family may recover only the economic damage recoverable under German law."²⁾

If the Draft Bill is adopted and you stand in a french bus queue French law will apply to you. In the writer's opinion it seems more equitable to apply one law to all

1) Ibid

2) Ibid

the victims in the queue than to apply different laws depending on where the vehicle is registered. It is not arbitrary to apply French law here nor is it unjust; if you do not want French law to apply to you, you do not stand in a French bus queue. Again the Draft Bill avoids the problem of habitual residence and multi-registration.

4. "A Frenchman, driving his French registered car in England, swerves to avoid an English bicyclist. The cyclist is not hurt, but the car hits a tree, and a passenger is injured. He sues the driver. The applicable law will depend on whether the cyclist was 'involved' in the accident, rendering it a two-vehicle accident in which one was not from the Registration State. The same problem - plus the difficulty of determining the nature of a 'vehicle' for the purposes of this rule - would be posed if the cause of the swerving had been an "equestrian, a baby carriage, or a boy on roller skates."¹⁾

If the *lex loci delicti*, that is English Law is applied then the problems posed by

1) Ibid

Cavers disappear.

The alternatives to the Draft Bill in the above situations are The Proper Law approach and Governmental interest analysis. If the two Danes above know each other in Denmark, if there was some personal relationship between them centred in Denmark¹⁾ then it could be argued that Denmark would be The Proper Law, and the more appropriate law to apply to the specific situation. The advantage of the Draft Bill is that shades of degree are avoided. What if the two Danes had only met in Amsterdam or suppose that although habitually resident in Denmark they were both Swedish by nationality or one was Swedish and the other Finnish. If the proper law of Denmark is not to apply if the parties only met in Amsterdam but would apply if they were old friends where is the dividing line? It seems almost inevitable that an injustice could arise if the Proper Law was applied or not applied in this situation. On the other hand by treating the parties the same the Draft Bill produces

1) See Morris at p.284

uniformity which can make for justice,
predictability and certainty.

In the second of Cavers situations
there appears to be no Proper Law and in the
third case if German law is the Proper Law then
different laws are going to apply to persons
in the queue with the disadvantages noted
above.¹⁾ Finally in the fourth case it
is not possible to argue that either French or
English law is the Proper Law.

1) Supra at p. 152 et. seq.

S U M M A R Y

(* Key on p.158)¹⁾

Case or Variation	Law Applied	Dr.Bill	Art.25	GIA	P.L.	F.T.(C.)	EEC DRAFT	HAGUE	C.D.(T.A.)
1. In Re Paris Air Crash	GIA	C	C or F	C	C	C	C poss F 10(1) or 10(2)	N/A	N/A
2. Make Disaster due to Pilot Negligence	N/A	F	C or F	?	None?	?	F 10(1)	N/A	N/A
3. Hurtado v. Superior Court	GIA	C	C	C poss. M	C	C	10(1) or 10(2) Get C	A.3 or 4 get C	S.3 C
4. Kieger c. Amigues	LLD	G	G	F or G?	F or G? None?	F?	G - 10(1)? F - 10(2)?	A.4(b) F	S.4(1) (a) F
5. Kieger c. Amigues make Def. German 2)	N/A	G	G	F or G?	G? or None?	F or G?	G 10(1) or 10(2)	A.3 G	S.3 G
6. Boys v. Chaplin	P v. E	M	M	M or E?	M or E?	M or E?	M 10(1) or E 10(2)	A.4(b) E	S.4(1) (a)- (e)
7. Boys v. Chaplin make Def. German	N/A	M	M	?	None	E, M or G?	M 10(1)	A.3 M	S.3 M
8. Boys v. Chaplin make Def. English but perm. situated in Malta	N/A	M	M	M or E?	None or M?	M or E?	M 10(1) or E 10(2)	A.4(b) E	S.7(1) (b) M or S.4(1) (a) E?
9. M'Elroy v. M'Allister	P v. E	E	E	S or E	S	S	S 10(2)	A.4(b) S	S.4(1) (a) S
10. La Van v. Danyluk	P v. E	W	W	W or BC	BC	BC	BC 10(2)	A.4(b) BC	S.4(1) (a) BC
11. La Van v. Danyluk make Def. German	N/A	W	W	?	None?	BC, G?	W 10(1)	A.3 W	S.3 W
12. La Van v. Danyluk make Def. from Washington	N/A	W	W	W or BC	None?	BC, W?	W 10(1) or 10(2)	A.3 W	S.3 W
13. Anderson's Case	P v. E	ACT	ACT	?	None?	ACT, NSW?	ACT 10(1)	A.4(b) NSW	S.4(1) (a) NSW

* Key to Summary on p.157

1) Abbreviations used:-

Dr. Bill - Draft Bill; Art.25 - Article 25 Italy;
GIA - Governmental Interest Analysis; P.L. - Proper
Law; F.T. (C.) - Draft Foreign Torts Act (Canada);
Hague - Hague Convention on the Law Applicable to
Traffic Accidents; C.D.(T.A.) - Canadian Draft
(Traffic Accidents) Act; C - Californian;
F - French; poss. - possibly; N/A - Not applicable;
M - Maltese; M - Mexican; A. - Article;
P v. E - Phillips v. Eyre; LLD - Lex Loci Delicti;
G - German; S - Section; E - English;
S - Scottish; W - Washington; BC - British
Columbia; ACT - Australian Capital Territories;
NSW - New South Wales;

2) Assume throughout that the vehicle is registered
in the Defendant's or Plaintiff's country or
state.

This Summary suggests:-

1. The Draft Bill produces the most certain results. The Italian provision, a close second is uncertain in Cases 1 and 2.
 2. Governmental Interest Analysis except in the most obvious of cases is unsatisfactory for providing solutions to international accidents.
 3. The Proper Law is only of assistance in Cases 3, 9, and 10 which suggests that perhaps at least for motor vehicle accidents there is no need for a Proper Law type exception. Cases 9, and 10 have unusual facts and Case 9 was the very case which led to the development of the Proper Law. Case 10 is unusual in so far as all concerned were from British Columbia. It is suggested that Case 12 is a more likely fact situation and here the Proper Law exception is not helpful.
 4. The Draft Foreign Torts Act (Canada) is of little assistance in predicting the applicable law.
-

5. A comparison of Cases 4 and 5 and 6, 7 and 8 illustrate that the Hague Convention and the Canadian Draft (Traffic Accidents) Act can produce arbitrary results in comparison with the Draft Bill.
6. The E.E.C. Draft is uncertain and of limited assistance.
7. Where the Draft Bill produces a result which differs from the actual law applied in the cases the differing result is not in any of the cases unjust to the litigants concerned.

Conclusion:-

The traditional solutions to the choice of law problem have been criticised as rigid and inflexible and this led to the development of judicial, academic and legislative alternatives. These alternatives have made for uncertainty and confusion, in theory and practice, in the jurisdictions which have joined the conflicts revolution, and this would indicate that a return to the *lex loci delicti* is desirable. It would be simplistic to suggest that the place of acting - *lex loci delicti* rule is the ultimate answer. It is however the argument of this thesis that it is the most satisfactory solution to date. Applied to actual cases it produces results that are not unsatis-

factory (although admittedly the handful of decided cases discussed in Part C above are insufficient to justify anything beyond the most tentative and speculative of conclusions). There may not be an ultimate solution except in the sense of abolishing the problem by having one world wide tort law and this, even if a possibility, is far off. Meanwhile it must be remembered that international torts and accidents in particular are unfortunately not rare events. What is needed is as good a system as possible, legal chaos should not be added to events which often result in tragedy. Whilst conflict of laws lends itself to academic discussion and debate it is also a subject of considerable practical importance and,

"Scholars, in their fascination with conflicts should not forget that the game is not being played so they can flex their jurisprudential muscles but in order to better the human condition through law..."¹⁾

There is not likely to be a decline in international accidents and whilst liability for some situations will be replaced by insurance, such schemes (for example the New Zealand model) may, in defining their personal and territorial reach lead to new

1) Rosenberg. Comments on Reich v. Purcell 15 U.C.L.A.L. Rev. 551 at p. 641 (1968) quoted by F. Jeunger. Choice of Law in Interstate Torts 118 Univ. of Pen. L.R. 202 at p. 218 (1969).

conflicts.¹⁾

Finally it has been said that

"...the pursuit of harmony is the principle task of those who make it their concern to think about private international law..."²⁾

Application of the lex loci makes for international harmony in so far as it is, of any one approach, the most widely used.³⁾ The lex loci delicti works.

o-o-o-o

1) See N.G. Baer. Limited Automobile Accident Insurance & Choice of Law. 19 No.2 McGill L.J. 284 (1973) & W. Pfennigstorf 'Unification of the Protection of Traffic Victims in Europe 15 Am.Jo. of Comp. Law 436 (1967)

2) O. Kahn Freund. General Problems of Private International Law (1976) p.323

3) Supra at p.119

REFERENCES

- ALLEN, J.V. (1977), Air Disasters: The Case of Rationalisation 43 Jo. of Air Law & Commerce 555.
- ANTON, A.E. (1967), Private International Law (W. Green Edinburgh)
- BAADE, H.W. (1973), The Case of the Disinterested Two States: Neumeier v. Keuhner 1 Hofstra L.R. 150
- BAER, M.G. (1973), Limited Automobile Accident Insurance & Choice of Law. 19 No.2 McGill L.J. 284
- BAXTER, W.F. (1963), Choice of Law & the Federal System 16 Stanford L.R. 1.
- BELL, R.M. (1975), Conflict of Laws. Aspects of The Accident Compensation Act.. Dissertation for LLB (Hons) University of Auckland.
- BOAST, R.P. (1978/79), In Spite of Accident Compensation, Injury Claims Can Still go to Court. Automobile Association Motor World
- BRADLEY, J.F. (1967), After Hurtado and Bernhard: Interest Analysis & The Search For a Consistent Theory for Choice of Law Cases. 29 Stanford L.R. 127
- BRITON (1980) H.M.S.O.
- CASTEL, J.G. & CRÉPEAU, P.A. (1971), Views from Canada Vol.18 The Am.Jo. of Comp. Law 17.
- CASTEL, J.G. (1975), Canadian Conflict of Laws Vol.2 (Toronto. Butterworths)
- CAVERS, D.F. (1933), A Critique of the Choice of Law Problem. 47 Harv. L.R. 173
- CAVERS, D.F. (1965), The Choice of Law Process. (Univ. of Michigan Press. Ann Arbor. Mich.)
- CAVERS, D.F. (1971), Symposium on the Value of Principled Preferences. 49 Texas L.R. 211.
- CAVERS, D.F. (1971), Legislative Choice of Law: Some European Examples. 44 So. Calif.L.R. 340

- CHEATHAM, E.E. & REESE, W.L.M. (1952), Choice of The Applicable Law. 52 Colum.L.R. 959.
- CHESHIRE's Private International Law (1979) 10th Edit. (P.M. North) (Butterworths, London)
- CHILDRES, R.D. (1962), Towards the Proper Law of the Tort. Texas L.R. 336
- CLARENCE-SMITH, J.A. (1957), Torts and the Conflict of Laws. 20 M.L.R. 447
- CLARENCE-SMITH, J.A. (1970), Bartolo on the Conflict of Laws. Vol.XIV The Am.Jo. of Legal History 157 and 247
- COLLINS, D.B., (1978), Proceedings for Punative Damages in the Regime of Accident Compensation N.Z.L.J. 158.
- COOK, W.W. (1924), The Logical & Legal Bases of the Conflict of Laws 33 Yale L.J. 457
- CRAMPTON, R.C. & CURRIE, D.P. (1968), Conflict of Laws (American Casebook Series. West Publishing Co.)
- CURRIE, B. (1963), Selected Essays on the Conflict of Laws (Duke Univ. Press. Durham. N.C.)
- CURRIE, B. (1963), Comment on Babcock v. Jackson. A Recent Development in Conflict of Laws. 63 Colum. L.R. 1212
- DAHL, H.W. (1976), Injury Compensation for Everyone? The New Zealand Experience. 53 Jo. of Urban Law. 925
- DE NOVA (1964), Current Developments of Private International Law 13 The Am. Jo. of Comp. Law. 543
- DELAUME, G.R. (1971), Recent French Decisions. 18 Am. Jo. of Comp. Law 7.
- DICEY and MORRIS on the Conflict of Laws (1973) 9th Edit (J.H.C. Morris) (Stevens. London)

- EHRENZWEIG, A.A. (1960), The Lex Fori: The Basic Rule in the Conflict of Laws 58 Mich.L.R. 637
- EHRENZWEIG, A.A. (1962) A Treatise on the Conflict of Laws (West Publishing Co.)
- EHRENZWEIG, A.A. (1965) A Proper Law in a Proper Forum. A "Restatement" of the Lex Fori Approach. 18 Okla L.R. 340
- EHRENZWEIG, A.A. (1965), The Second Conflicts Restatement: A Last Appeal for its Withdrawal. 113 Univ. of Pen.L.R. 1230
- EHRENZWEIG, A.A. (1967), False Conflicts and the Better Rule: Threat & Promise in Multistate Tort Law. 53 Virginia L.R. 846
- EHRENZWEIG, A.A. & JAYME E. (1977), Private International Law Vol.111 (Sijthoff-Leyden)
- FALCONBRIDGE, J.D. (1954), Essays on the Conflict of Laws, 2nd Ed. (Canada Law Book Company, Toronto)
- FOSTER, J.G. (1935) Some Defects in the English Rules of Conflict of Laws. 16 B.Y.B.I.L. 84
- GERBER, P. (1966), Tort Liability in the Conflict of Laws 40 A.L.J. 44 & 73
- GRAVESON, R.H. (1951) Choice of Law & Choice of Jurisdiction in the English Conflict of Laws 28 B.Y.B.I.L. 273
- GRAVESON, R.H. (1962), Philosophical Aspects of the English Conflict of Laws. 78 L.Q.Rev. 337
- GUTHRIE (1869) Translation of Savigny's 'System des heutigen roemischen Rechts (1849)
- GUTTERIDGE, H.C. (1938), a New Approach to Private International Law 6 Camb. L.J. 16
- GUTTERIDGE, H.C. (1951), The Codification of Private International Law (Jackson. Glasgow)

- HALLER, B.E. (1968), Death in the Air. Federal Regulations of Tort Liability A Must. 54 Am. Bar Assn. Jo. 382
- HANCOCK, M. (1940), Torts in the Conflict of Laws. The First Rule in Phillips v. Eyre 3 U.Tor.L.J. 400
- HANCOCK, M. (1942), Torts in the Conflict of Laws (Univ. of Michigan Press. Ann Arbor, Mich).
- HANCOCK, M. (1944), A Problem in Damages for Tort in the Conflict of Laws. 22 Can. Bar. Rev. 843
- HANCOCK, M. (1968), Torts Problems in Conflict of Laws Resolved by Statutory Construction: The Halley and other Older Cases Revisited. 18 U.Tor.L.J. 331.
- HANCOCK, M. (1968), Canadian American Torts in the Conflict of Laws: A Revival of Policy Determined Construction Analysis 46 Can Bar Rev. 226
- HOFF, G.G. (1952), Adjustment of Conflicting Rights 38 Virginia L.R. 745
- HOGUE, L.L. (1978) Arkansas New Choice of Law Rule for Interstate Torts: A critique of Wallis, Williams, and the Better Rule of Law. 4 Wash. University L.Q. 713.
- JITTA, D.J. (1919), The Renovation of International Law on the Basis of a Juridical Community of Mankind.
- JEUNGER, F. (1969), Choice of Law in Interstate Torts. 118 Univ. of Penn. L.R. 202.
- KAHN FREUND, O. (1960), The Growth of Internationalism in English Private International Law. Magnes Press. The Hebrew University.
- KAHN-FREUND, O. (1968), Recueil des Cours. 11.5
- KAHN-FREUND, O. (1976), General Problems of Private International Law (Sijthoff-Leyden)

- KARSTEN, I.G.F. (1970), Chaplin v. Boys: Another Analysis 19 I.C.L.Q. 35
- KRAMER, R. (1959) Interest & Policy Clashes in Conflict of Laws. Vol XIII Rutgers L.R. S23.
- LEFLAR, R.A. (1968) American Conflicts Law, rev.ed. (Bobbs-Merrill Company, Indianapolis. Kansas City N.Y.)
- LORENZEN, E.G. (1931) Tort Liability and the Conflict of Laws. 47 L.Q.R. 433
- MCCUSKER, P.D. (1950) The Italian Rules of Conflict of Laws. 25 Tulane L.R. 70.
- MCDUGAL, L.L. (1977), Choice of Law: Prologue to a Viable Interest Analysis Theory 51 No.2 Tulane L.R. 207
- MCGREGOR, H. (1970), The International Accident Problem 33 M.L.R. 1
- MCINNES, R.D. (1969), Punishing the Words of S.5(1) The Other School of Thought Replies, N.Z.L.J. 8
- MCCLEAN, J.D. (1969), Torts in the Conflict of Laws 43 A.L.J. 185
- MORELAND 1967/68 Conflict of Law. Choice of Law in Torts. A Critique 56 Kentucky L.J. 5
- MORRIS, J.H.C. (1949), Comment on M'Elroy v. M'Allister 12 M.L.R. 248
- MORRIS, J.H.C. (1951), The Proper Law of the Tort 64 Harv. L.R. 881
- MORRIS, J.H.C. (1971), & (1980) (1st & 2nd Edits) The Conflict of Laws (Stevens. London).
- MORSE, C.G.J. (1978), Torts in Private International Law (North - Holland)

- NADELMANN, K.H. (1964), A Translation of Wächter's
Archiv für die civilistische Praxis 13 Am.J.
Comp. Law 414.
- NEW ZEALAND OFFICIAL YEAR BOOK 1980 Dept. of Statistics
- NIBOYET, J.P. (1952), Territoriality & Universal Recognition
of Rules of Conflict of Laws. 65 Harv. L.R. 582
- NORTH, P.M. (1967), Contributory Negligence & the Conflict
of Laws. 16 I.C.L.Q. 379
- NORTH, P.M. & WEBB, P.R.H. (1970), Foreign Torts & English
Courts: The Effect of Chaplin v. Boys 19 I.C.L.Q.
24.
- NYGH, P.E. (1970) Boys v. Chaplin or The Maze of Malta
44 A.L.J. 160
- NYGH, P.E. (1973) Boys v. Chaplin in the Antipodes
4 U. Tas.L.R. 161
- NYGH, P.E. (1977) Some Thoughts on the Proper Law of a
Tort. 27 I.C.L.Q. 932
- PEARL, D. (1968) Case & Comment. Camb.L.J. 220
- PFENNIGSTORF, W. (1967), Unification of the Protection
of Traffic Victims in Europe. 15 The Am. Jo.
of Comp. Law. 436
- POLLOCK, F. (1897) (Note) 13 L.Q.R. 233
- RABEL, E. Vol.II (1947) (1960) 1st & 2nd Edits. The
Conflict of Laws: A comparative Study
(Univ. of Michigan Press. Ann Arbor)
- RATNER, L.G. (1973/74), Choice of Law. Interstate Analysis
& Cost Contribution No. 3 47 So. Calif. L.R. 817
- READ, H.E. (1968), What should be the Law in Canada
Governing Conflict of Laws in Tort? Canadian
Legal Studies (1968) 227.
- REESE, W.L.M. (1972), Choice of Law. Rules or Approaches
57 No. 3 Cornell L.R. 315

- RHEINSTEIN, M. (1944), The Place of Wrong: A Study in the Method of Case Law. 19 Tulane L.R. 4.
- ROBB, S.D. (1977), The Tort Rule of Private International Law. The Chimera Incarnate. 8 Syd.L.R. 146
- ROBERTSON, A.H. (1940), The Choice of Law for Tort Liability In the Conflict of Laws. 4 M.L.R. 27
- SCHMITTHOFF, (1949), Torts Committed Abroad. 27 Can. Bar. Rev. 816
- SEDLER, R.A. (1967/68), Babcock v. Jackson in Kentucky 56 Kentucky L.J. 27.
- SEDLER, R.A. (1970), Characertisation Identification of the Problem Area and the Policy-Centred Conflict of Laws. An exercise in Judicial Method. Vol.2 Rutgers Camden L.J. 7
- SEDLER, R.A. (1973), Interstate Accidents & the Unprovided For Case. Reflections on Neumeier v. Kuehner. 1 Hofstra L.R. 125
- SEDLER, R.A. (1978), Choice of Law in Michigan: A Time to go Modern. 24 No.3 Wayne L.R. 829
- SEMMLER, C.M. (1978), Foreign Party to an Auto Accident in the USSR. Calculation of Damages. 12 International Lawyer. Summer 1978
- SHAPIRA, A. (1970), The Interest Approach to the Choice of Law With Special Reference to Tort Problems. (Martinus Nijhoff. The Hague)
- SHAPIRA, A. (1970), A Transatlantic Inspiration. The Proper Law of the Tort Doctrine. 33 M.L.R. 27
- SHAPIRA, A. (1973), Manna for the Entire World or Thou Shalt Love Thy Neighbour as Thyself. Comment on Neumeier v. Kuehner. 1 Hofstra L.R. 168.
- SHUMAN, S.I. (1970), Conflict of Laws 16 Wayne L.R. 535.

YNTEMA, H.E. (1949, Book Review. 27 Can. Bar Rev.
116

YNTEMA, H.E. (1957), The Objectives of Private Inter-
national Law. 35 Can. Bar Rev. 721.

TABLE OF CASES

ENGLAND

1. Amelia, The (1863) - p.21
2. Blads Case (1674) - p.8, 23
3. Blad v. Bamfield (1674) - p.23
4. Boys v. Chaplin (1971) - p.5, 16, 19, 20, 22, 26,
27, 29, 30-33, 35-38, 47, 50, 69, 96, 97, 98,
99, 120, 137-139, 143-144
5. Church of Scientology of California v. Commissioner
of Police for the Metropolis (1976) - p.33, 35
Church of Scientology v. Metropolitan Police
Commissioner (1977) - p.33, 35
6. Distillers Co. (Bio-Chemicals) Ltd. v. Thompson
(1971) - p.14, 118.
7. Dobree v. Napier (1836) - p.23
8. George Munroe Ltd. v. American Cyanamid & Chemical
Corporation 1944 - p.14
9. Halley, The (1868) - p.15, 16, 19, 21, 22
10. Machado v. Fontes (1897) - p.22, 24, 27, 35, 36,
96, 143
11. Mary Moxham, The (1876) - p.26
12. Mostyn v. Fabrigas (1774) - p.23
13. Nostra Signora de los Dolores, The (1813) - p.21
14. Phillips v. Eyre (1870) - p.9, 15, 17, 23, 27-29,
31-33, 36-39, 81-83, 89, 92, 94-96, 103, 110-
112, 119, 146, 147
15. Sayers v. International Drilling Co. (1971) - p.33,
35, 48.
16. Simpson v. Fogo (1863) - p.21
17. Zollverein, The (1856) - p.21

COMMONWEALTHAUSTRALIA:

1. Anderson v. Eric Anderson (Radio & T.V.) Pty.Ltd.
(1965) - p.18,19, 29, 30, 37, 120, 147-149.
2. Joss v. Snowball (1970) - p.37
3. Kemp v. Piper (1971) - p.37
4. Kolskyv. Maine Nickless (1970) - p.37
5. Koop v. Bebb (1951) - p.37
6. Schmidt v. Government Insurance Office of New
South Wales (1973) - p.38
7. Varawa v. Howard Smith Co. (1910) - p.26
8. Warren v. Warren (1972) - p.38

CANADA

1. Abbott Smith v. University of Toronto (1964) - p.14
2. Anderson v. Nobels Explosive Co. (1906) - p.14
3. Canadian National Steamship Co. v. Watson(1939)
- p. 143
4. Clark v. Clark (1966) - p.115
5. La Van v. Danyluk (1970) - p.36, 96, 120, 143-146.
6. Martin v. Marmen (1969) - p.26
7. McLean v. Pettigrew (1945) - p.26, 36, 143, 146
8. McMillan v. Canadian Northern Rly. (1923) - p.92,
97, 100
9. Moran v. Pyle National (Canada) Ltd. (1973) - p.14
10. Walpole v. Canadian Northern Rly. Co. (1921) -
p.26, 92, 97, 100

NEW ZEALAND

1. Betteridge & Another v. McKenzie & Others (1977)
- p.91
2. Donselaar v. Donselaar (1976) - p.91
3. Howse v. The Attorney General (1977) - p.90
4. My v. Toyota Motor Co. Ltd. (1977) - p.14
5. Richards v. McLean (1973) - p.22
6. Stowers v. The Mayor, Councillors & Citizens
of the City of Auckland (1977) - p.91

SCOTLAND

1. M'Elroy v. M'Allister (1949) - p.16, 18, 36,
41, 120, 140-142
2. Mitchell v. McCulloch (1976)- p.36
3. Naftalin v. London Midland & Scottish Rail Co.
(1933) - p.26,36

EUROPEAN ECONOMIC COMMUNITY

1. Handelskwekerij G.J. Bier & Stichting Reinwater v.
Mines de Potasse d'Alsace. (1977) - p.13

FRANCE

1. Kieger c. Amigues (1967) - p.120, 132-136,
138.
2. Latour c. Guiraud (1949) - p.133-136
3. Thomas c. Erste Allgemeine (1967) - p.133-136

UNITED STATES OF AMERICA

1. Abendschein v. Farrell (1969) - p.70
2. Babcock v. Jackson (1963) - p.42, 57, 60, 61,
62, 99
3. Bernhard v. Harrah's Club (1976) - p.52
4. Cipolla v. Shaposka (1970) - p.44
5. Dym v. Gordon (1965) - p.61
6. Forsyth v. Cessna Aircraft Co. - p.122
7. Hurtado v. Superior Court (1974) - p.61, 63, 66,
68, 120, 127, 130-131
8. Labree v. Major (1973) - p.67
9. Loucks v. Standard Oil Co. (1918) - p.21
10. Macey v. Rozbicki (1966) - p.61
11. Maguire v. Exeter & Hampton Company (1974) - p.50
12. Neumeier v. Kuehner (1972) - p.4, 44, 48, 54,
59, 67, 68, 105
13. In re Paris Air Crash of March 3, 1974, - p.120,
121-129, 151
14. Slater v. Mexican National Rly (1904) - p.9
15. Wallis v. Mrs. Smith Pie Co. (1977) - p.50
16. Wilson v. Faull (1958) - p.100

O-O-O-O

APPENDIX A

EUROPEAN ECONOMIC COMMUNITY

DRAFT CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL
AND NON-CONTRACTUAL OBLIGATIONS

PREAMBLE

The High Contracting Parties
[to the Treaty establishing the Euro-
pean Economic Community],

Anxious to pursue in the domain
of private international law the work
of unification of law undertaken in
the Community,

Desiring to establish uniform
rules relating to the law applicable
to contractual and non-contractual
obligations,

Have decided to conclude the
present convention and have to that
effect designated as plenipotentiaries

....

TITLE I: FIELD OF APPLICATION

Article 1

(1) The rules of private interna-
tional law of this Convention shall
apply to contractual and non-con-
tractual obligations in situations of
an international character.

(2) They shall not apply

(a) to matters of status and capac-
ity, save as regards Article 20, nor
to matters of matrimonial property,
succession, testaments, or gifts,

(b) to commercial papers such as
bills of exchange, cheques or promis-
sory notes,

(c) to agreements on arbitration or
choice of court,

(d) [to insurance contracts],

(e) to the constitution, internal op-
eration or dissolution of corporations
and other legal entities,

(f) to matters relating to damages
in the nuclear field.¹

TITLE II: UNIFORM RULES

Article 2

(1) Contracts shall be governed
by the law chosen by the parties.

(2) The requirements pertaining
to the validity of the consent of the
parties as to the applicable law shall

be governed by that law.

(3) [However, in labor relations,
the choice of the parties may in no
case affect mandatory provisions for
the protection of the worker in force
in the State where he works habit-
ually.]

(4) [From Annex] *First Variation*

The meaning of silence of a party
to a proposal made by the other party
before the formation of the contract
or in connection with it concerning
the applicable law shall be evaluated
according to the law of the habitual
residence of that party. However,
notwithstanding the provisions of that
law, agreement on the choice of the
applicable law may be deduced from
the silence of one of the parties if
such interpretation results from hab-
its previously established between the
parties or from usages of interna-
tional commerce of which the parties
have, or should have, knowledge on
account of their profession.

Second Variation

Agreement on the choice of the
applicable law may be deduced from
the silence of one of the parties only
if such interpretation results from
the habits previously established be-
tween the parties or from usages
practiced in international commerce.
However, if the contract has been
formed already, the law governing
the contract shall determine whether
silence does or does not mean a
choice of the applicable law.

Article 3

The choice by the parties of the
applicable law may be made at the
time of contracting or at a later date.
It may be modified at any time by
an agreement between the parties.
Any such modification as to the de-
termination of the applicable law
which occurs subsequent to the con-
clusion of the contract shall not affect
the rights of third parties.

1. The question of the law applicable to *ententes* has not been settled.

Article 4

(1) Failing an express or implied choice, the contract shall be governed by the law of the State with which it is most closely connected (*présente les liens les plus étroits*).

(2) That State shall be

(a) that in which the party who is to carry out such performance as is characteristic of the contract (*la partie qui doit fournir la prestation caractéristique*) has his habitual residence at the time of contracting, (b) if the characteristic performance is due in execution of a contract concluded in pursuance of professional activity, that in which such party had his principal place of business at the time of contracting, or

(c) that in which such party has a secondary place of business if it results from the contract that the characteristic performance will be carried out by that place of business.

(3) The preceding paragraph shall not apply if the characteristic performance, the habitual residence, or the place of business cannot be determined or if it results from all the circumstances that the contract is more closely connected with another State.

Article 5

Failing an express or implied choice, contracts relating to labor relations shall be governed by the law of the State

(a) where the worker performs his work habitually, or

(b) if the worker does not habitually perform his work in one and the same State, where the place of business is located which hired him, unless it results from all the circumstances that the labor contract is more closely connected with another State.

Article 6

Failing an express or implied choice, contracts involving immovable property shall be governed by the law of the place where the property is located, unless it results from all the circumstances that the contract is more closely connected with another State.

Article 7

Where a contract is connected also with a State other than the State whose law is applicable under Articles 2, 4, 5, 6, 16, 17, 18 and 19(3) and where the law of that other State contains provisions regulating the subject matter in a mandatory way so as to exclude application of any other law, such provisions shall be taken into account to the extent that their particular nature or purpose can justify that exclusion.

Article 8

(1) The requirements concerning the validity of the consent of the parties to the contract shall be governed by the law applicable under the preceding articles.

(2) [From Annex] *First Variation*

The meaning of silence of a party as regards the formation of the contract is evaluated according to the law of the habitual residence of that party. However, notwithstanding the provisions of this law, consent to a contract may be deduced from the silence of one of the parties if this interpretation results from the habits previously established between the parties or from usages of international commerce of which the parties have or should have knowledge on account of their profession.

Second Variation

The formation of the contract may be deduced from silence of one of the parties only if that interpretation results from the habits previously established between the parties or from usages practiced in international commerce.

Article 9

The provisions of Articles 2 to 8 shall not apply to the transfer of property or to *in rem* effects of the contract.

Article 10

(1) Non-contractual obligations resulting from an event causing damage shall be governed by the law of the State in which such event occurred.

(2) However, if, on the one hand, no significant link exists between the situation resulting from the event which caused the damage and the State in which the event occurred and if, on the other hand, such situation has predominant connection (*connexion prépondérante*) with another State, the law of that State shall apply.

(3) Normally, such a connection must be based on a connecting factor common to the victim and the author of the damage or, if the liability of a third party as author is involved, a connecting factor common to the victim and the third party.

(4) Where there are two or more victims, the applicable law is determined separately for each of them.

Article 11

The law applicable to non-contractual obligations under Article 10 shall determine in particular

1. the conditions and extent of liability;
2. the grounds for exemption from liability, as well as any limitation and division of liability;
3. the existence and nature of damages for which there may be compensation;
4. the kinds and extent of compensation;
5. the extent to which the victim's rights to damages may be exercised by his heirs;
6. the persons who have suffered damage and may claim damages in their own right;
7. vicarious liability;
8. rules of prescription and limitation, including rules relating to commencement of a period of prescription or limitation, to interruption or suspension of such a period.

Article 12

Whatever the applicable law under Article 10, in determining liability account shall be taken of rules of safety and public order in force at the place and time of the event which caused the damage.

Article 13

Non-contractual liability resulting from an event other than one causing damage shall be governed by the law of the State in which such event occurred. However, if due to a connecting factor common to the parties involved, a predominant link exists with the law of another State, that law shall be applied.

Article 14

The provisions of Articles 10 to 13 shall not apply to the liability of States or other legal persons of public law, or to that of their organs or agents for acts involving public administration and done by them in the performance of their functions.

Article 15

(1) The law governing an obligation shall also determine requirements pertaining to its execution, the various ways in which it may be discharged and the consequences of non-execution.

(2) As regards the means of execution of an obligation, the law of the State where the execution takes place shall be taken into account.

Article 16

(1) Obligations between assignor and assignee of a debt shall be governed by the law applicable under Articles 2 to 8.

(2) The law governing the original debt determines whether the debt may be assigned; it also regulates the relations between assignee and debtor and the conditions under which the assignment may be invoked against the debtor and third parties.

Article 17

(1) A statutory assignment of a debt shall be governed by the law regulating the legal institution for which the assignment has been created.

(2) Nevertheless, the law governing the original debt shall determine whether the debt may be assigned,

and it determines the rights and obligations of the debtor.

Article 18

(1) To be valid as to form, a juridical act must satisfy the requirements established by either the law which governs its essential validity or governed that validity at the time it was done, or by the law of the place where it was done. Where a juridical act results from several declarations of intention, the formal validity of each is determined separately.

(2) The provisions of this article shall not apply to the creation, assignment or extinction of rights *in rem* in a thing.

Article 19

(1) Existence and force of legal presumptions as well as burden of proof shall be governed by the law applicable to the legal relationship. However, consequences which may be deduced from the attitude of the parties during the litigation shall be governed by the law of the forum.

(2) Admissibility of various kinds of evidence for proof of juridical acts shall be determined by the law of the forum. However, the parties may also avail themselves of any kinds of evidence admissible under laws identified in Article 18 which support the formal validity of such act, provided such kinds of evidence are not incompatible with the law of the forum.

(3) The extent to which a private written document stating obligations due by its signatory or signatories is sufficient evidence of these obligations, as well as the admissibility of evidence to add to, or contradict the contents of such document shall be determined by the law governing the formal validity of the act under Article 18. If this document is acceptable as evidence under both the law governing the essential validity and that of the place where it was done, only the first of these two laws shall apply.

Article 20

No natural person may invoke his own incapacity against a party who

in a juridical act in good faith and without acting imprudently considered him as having capacity in conformity with the law of the place where the act was done.

Article 21

For the purposes of the preceding provisions, the law of the State shall mean rules of law in force in that State, excluding, however, the rules of private international law.

Article 22

The application of any of the laws designated by the preceding provisions may be refused only if manifestly contrary to public policy (*ordre public*).

Article 23

For the interpretation and application of the preceding uniform rules their international character shall be taken into account as well as the desire to achieve uniformity in their interpretation and application.

TITLE III: FINAL PROVISIONS

Article 24

The application of Articles 1 to 23 of this Convention shall be independent of any condition of reciprocity. The Convention shall apply even if the applicable law is not that of a Contracting State.

Article 25

This Convention shall not prevent the application of rules of private international law relating to special matters contained in Normative Acts emanating from the Institutions of the European Communities or in national law harmonized in execution of these Acts.

(2) This Convention shall not affect provisions of private international law contained in Conventions to which the Contracting States are or will be Parties within the set-up of the treaties instituting the European Communities.

Article 26

(1) If, after the entry into force of

this Convention for a Contracting State, in a special matter that State desires either to derogate from the provisions of the preceding Title or to supplement them, the State shall communicate its intention to the other Signatory States through the intermediary of the Secretary General.

(2) Within six months from the communication to the Secretary General, any State may ask the latter to organize consultations between the Signatory States designed to reach an agreement.

(3) If within this period no State has asked for the consultation or within the two years following the communication addressed to the Secretary General no agreement has been reached in consequence of the consultations, the State may modify its legislation in the sense it had indicated. The measure taken by that State is brought to the attention of the other Signatory States.

Article 27

This Convention shall not affect the application in a Contracting State of bilateral or multilateral Conventions already entered into by that State.

Article 28

If, after the entry into force of this Convention for a Contracting State, that State desires to become a party to a multilateral Convention whose principal purpose or one of the principal purposes is regulation of private international law in one of the matters covered by this Convention or if it desires to denounce such a Convention, the procedure established in Article 26 shall apply. However, the time period of two years provided for in subsection 3 of Article 26 is reduced to one year.

Article 29

If a Contracting State deems the unification achieved by this Convention endangered by conclusion of agreements not envisaged in the preceding Article, the State may ask the Secretary General of the Council of the European Communities to organize a consultation between the States signatory of this Convention.

Article 30

After consultation of the other Signatory States through the intermediary of the Secretary General of the Council of the European Communities, each Contracting State may ask for revision of this Convention. In that event, a conference of revision shall be called by the President of the Council of the European Communities.

Article 31

(1) This Convention shall apply to the European Territory of the Contracting States, to the French overseas departments and to the French overseas territories.

(2) The Kingdom of the Netherlands may at the moment of the signature or ratification of this Convention or at any time thereafter declare by way of notification of the Secretary General of the Council of the European Communities that this Convention shall apply to Surinam and the Netherlands Antilles.

Article 32

This Convention shall be ratified by the Signatory States. The instruments of ratification shall be deposited with the Secretary General of the Council of the European Communities.

Article 33

This Convention shall enter into force the first day of the third month after deposit of the fifth instrument of ratification. The Convention shall enter into force for each Signatory State which ratifies subsequently on the first day of the third month after deposit of his instrument of ratification.

Article 34

The Secretary General of the Council of the European Communities shall give notice to the Signatory States of:

- (a) the deposit of each instrument of ratification;
- (b) the date on which this Convention enters into force;

- (c) communications made in application of Articles 26, 28, 29, 30 and 31.

Article 35

This Convention is concluded for an unlimited time.

Article 36

This Convention in a single copy in the German, French, Italian, Dutch, . . . and . . . languages, these texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary General shall send a certified copy to each of the governments of the signatory States.

JOINT DECLARATION

At the moment of proceeding to the signature of this Convention, the governments . . .

anxious as far as possible to avoid the dispersing of rules of conflict of laws over multiple instruments and divergences between these rules, desire that, in exercising their jurisdiction on the basis of the treaties which have established them, the In-

stitutions of the European Communities make an effort when the case arises to adopt rules of conflict as far as possible in harmony with those of this Convention,

desire that for the preparation of Community Acts carrying rules of conflict of laws these Institutions secure the views of governmental experts on private international law and use all proper means to give full effect to assistance coming from these experts.*

* Note of the Translator. For a possible conflict see art. 3 of the proposed draft Regulation concerning conflicts of laws in the matter of labor relations submitted to the Council by the Commission on March 23, 1972 (J.O., n. C 49/26, 18 May 1972). The rule of the article refers to the law of the state of the location of the establishment in which the laborer is employed, with no room left for application of the law chosen by the parties or law becoming applicable under the principles of private international law and more favorable to the laborer. See Pocar, "La legge applicabile ai rapporti di lavoro secondo il diritto italiano," 8 *Rivista di diritto internazionale privato e processuale* 727, 751-54 (1972).

APPENDIX B

APPENDIX

CONDITIONALLY APPROVED DRAFT OF A UNIFORM CONFLICT OF LAWS, (TRAFFIC ACCIDENTS) ACT¹

1. (1) In this Act,
 - (a) "accident" means an accident that involves one or more vehicles and is connected with traffic on a highway;
 - (b) "highway" means any place or way, including any structure forming part thereof, which the public is ordinarily, or a number of persons are, entitled or permitted to use for the passage of vehicles, with or without fee or charge therefor and includes all the space between the boundary lines of any right-of-way or land taken, acquired or used therefor, and includes
 - (i) a privately owned area designed and intended and primarily used for the parking of vehicles and the necessary passage ways thereon, and
 - (ii) a publicly owned area designed and intended to be used exclusively for the parking of vehicles and the necessary passage ways thereon;
 - (c) "pedestrian" includes any person who, at the place of the accident, was not carried on a vehicle;
 - (d) "state" includes a province [and territory] of Canada and a territorial entity of a state, if this entity has its own legal system in respect of tortious liability arising from an accident; and
 - (e) "vehicle" means a device, whether motorized or not, in, upon or by which a person or thing is or may be transported or drawn upon a highway except a device used exclusively upon stationary rails or tracks.
- (2) A reference to the laws of a state shall be read as a reference to its internal laws excluding the conflict rules.
- (3) A reference to the registration of a vehicle shall be read as a reference to its registration at the time of the accident in question.
- (4) The reference to chattels carried on a vehicle shall be read as a reference to chattels lying, standing or resting on any part of the vehicle.
2. (1) Subject to subsection (2) and to section 11, this Act determines the law applicable to tortious liability arising from an accident.
- (2) This Act does not apply
 - (a) to the liability of manufacturers, sellers or repairers of vehicles;
 - (b) to the liability arising out of a breach of duty to maintain a highway or attaching to the ownership, occupation, possession or control of land;
 - (c) to vicarious liability other than that of the owner of a vehicle, of a principal, or of a master;
 - (d) to an action by or against a person who caused or contributed to an accident for contribution, indemnity or any other relief over;

- (e) to an action for contribution or indemnity from, or any other relief over against, an insurer or a subrogation action by an insurer; or
- (f) to an action by or against a person administering a workmen's compensation fund, a social insurance or similar scheme, by or against an unsatisfied judgement fund or any person administering a similar fund, or to any exemption from liability provided by the law governing these persons, institutions, funds or bodies.

3. Subject to sections 4, 5, 6 and 7, the law applicable under section 2 is the law of the state where the accident occurred.

4. (1) Where

- (a) one vehicle is involved in the accident and is registered in a state other than the state where the accident occurred, or, where more than one vehicle is involved, each is registered in the same state being a state other than the state where the accident occurred; and
- (b) each pedestrian, if any, who caused or contributed to the accident has his habitual residence in the state mentioned in clause (a), whether or not he is also a victim of the accident,

the law of the state of registration, subject to section 7, determines

- (c) liability to the driver, owner or any other person having control of, or a proprietary interest in, the vehicle, if at least one of these persons has his habitual residence within the state of registration;
- (d) liability to a passenger whose habitual residence is in a state other than the state where the accident occurred, but not necessarily in the state mentioned in clause (a); and
- (e) liability to a pedestrian whose habitual residence is in the state mentioned in clause (a).

(2) Where there are two or more victims, the applicable law is determined separately for each of them.

5. (1) The liability mentioned in clause (c) of subsection (1) of section 4 includes liability for damage to chattels carried on the vehicle other than chattels mentioned in subsection (2).

(2) The liability mentioned in clause (d) of subsection (1) of section 4 includes liability for damage to chattels that are carried on the vehicle and that are either owned by the passenger or have been entrusted to his care.

(3) The liability mentioned in clause (e) of subsection (1) of section 4 includes liability for damage to chattels owned by the pedestrian, whether or not the chattels were carried on a vehicle.

6. Liability for damage to chattels not carried on a vehicle at the time of the accident, except those mentioned in subsection (3) of section 5, is governed by the law of the state where the accident occurred.

7. The law of the state where a vehicle was habitually stationed at the time of the accident applies, instead of the law men-

tioned in subsection (1) of section 4, where

- (a) the vehicle is registered in more than one state or is not registered at all; or
- (b) at the time of the accident, none of the persons mentioned in clause (c) of subsection (1) of section 4 had his habitual residence in the state of registration.

8. The law applicable under section 2 determines, in particular,

- (a) the existence of liability and its extent;
- (b) the grounds for exemption from liability, any limitation of liability and any division of liability;
- (c) the existence and kind of injury or damage for which damages may be claimed;
- (d) the amount of damages;
- (e) the question whether a right to damages may be assigned or inherited;
- (f) the persons who have suffered injury or damage and who may claim damages in their own right;
- (g) the liability of a principal or master for the acts of his agent or servant; and
- (h) rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of that period.

9. (1) In this section, "insurer" means an insurer of the person alleged to be liable.

(2) Where the law applicable under section 2 is the law of the state where the accident occurred, a direct action against an insurer lies if such action is authorized by that law or by the law governing the insurance policy.

(3) Where the law applicable under section 2 is the law of the state of registration, a direct action against an insurer lies if such action is authorized by that law, the law of the state where the accident occurred or by the law governing the insurance policy.

10. The law of the state where the accident occurred, and in force at that time, determines the rules relating to the control and safety of traffic.

11. No law that would be applicable under this Act applies if its application is manifestly contrary to public policy.

APPENDIX C

APPENDIX

The Hague Convention on the Law Applicable to Traffic Accidents 1968

The States signatory to the present Convention,

Desiring to establish common provisions on the law applicable to civil non-contractual liability arising from traffic accidents,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall determine the law applicable to civil non-contractual liability arising from traffic accidents, in whatever kind of proceeding it is sought to enforce this liability.

For the purpose of this Convention, a traffic accident shall mean an accident which involves one or more vehicles, whether motorised or not, and is connected with traffic on the public highway, in grounds open to the public or in private grounds to which certain persons have a right of access.

Article 2

The present Convention shall not apply

- (1) to the liability of manufacturers, sellers or repairers of vehicles;
- (2) to the responsibility of the owner, or of any other person, for the maintenance of a way open to traffic or for the safety of its users;
- (3) to vicarious liability, with the exception of the liability of an owner of a vehicle, or of a principal, or of a master;
- (4) to recourse actions among persons liable;
- (5) to recourse actions and to subrogation in so far as insurance companies are concerned;

- (6) to actions and recourse actions by or against social insurance institutions, other similar institutions and public automobile guarantee funds, and to any exemption from liability laid down by the law which governs these institutions.

Article 3

The applicable law is the internal law of the State where the accident occurred.

Article 4

Subject to Article 5, the following exceptions are made to the provision of Article 3:

- (a) Where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability
 - towards the driver, owner or any other person having control of or an interest in the vehicle, irrespective of their habitual residence,
 - towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred,
 - towards a victim who is outside the vehicle at the place of the accident and whose habitual residence is in the State of registration.Where there are two or more victims the applicable law is determined separately for each of them.
- (b) Where two or more vehicles are involved in the accident, the provisions of (a) are applicable only if all the vehicles are registered in the same State.
- (c) Where one or more persons outside the vehicle or vehicles at the place of the accident are involved in the accident and may be liable, the provisions of (a) and (b) are applicable only if all these persons have their habitual residence in the State of registration. The same is true even though these persons are also victims of the accident.

Article 5

The law applicable under Articles 3 and 4 to liability towards a passenger who is a victim governs liability for damage to goods carried in the vehicle and which either belong to the passenger or have been entrusted to his care.

The law applicable under Articles 3 and 4 to liability towards the owner of the

vehicle governs liability for damage to goods carried in the vehicle other than goods covered in the preceding paragraph.

Liability for damage to goods outside the vehicle or vehicles is governed by the internal law of the State where the accident occurred. However the liability for damage to the personal belongings of the victim outside the vehicle or vehicles is governed by the internal law of the State of registration when that law would be applicable to the liability towards the victim according to Article 4.

Article 6

In the case of vehicles which have no registration or which are registered in several States the internal law of the State in which they are habitually stationed shall replace the law of the State of registration. The same shall be true if neither the owner nor the person in possession or control nor the driver of the vehicle has his habitual residence in the State of registration at the time of the accident.

Article 7

Whatever may be the applicable law, in determining liability account shall be taken of rules relating to the control and safety of traffic which were in force at the place and time of the accident.

Article 8

The applicable law shall determine, in particular,

- (1) the basis and extent of liability;
- (2) the grounds for exemption from liability, any limitation of liability, and any division of liability;
- (3) the existence and kinds of injury or damage which may have to be compensated;
- (4) the kinds and extent of damages;
- (5) the question whether a right to damages may be assigned or inherited;
- (6) the persons who have suffered damage and who may claim damages in their own right;
- (7) the liability of a principal for the acts of his agent or of a master for the acts of his servant;
- (8) rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

Article 9

Persons who have suffered injury or damage shall have a right of direct action against the insurer of the person liable if they have such a right, under the law applicable according to Articles 3, 4 or 5.

If the law of the State of registration is applicable under Articles 4 or 5 and that law provides no right of direct action, such a right shall nevertheless exist if it is provided by the internal law of the State where the accident occurred.

If neither of these laws provides any such right it shall exist if it is provided by the law governing the contract of insurance.

Article 10

The application of any of the laws declared applicable by the present Convention may be refused only when it is manifestly contrary to public policy ('ordre public').

(Articles 11–21 omitted)

(2) However, if, on the one hand, no significant link exists between the situation resulting from the event which caused the damage and the State in which the event occurred and if, on the other hand, such situation has predominant connection (*connexion prépondérante*) with another State, the law of that State shall apply.

(3) Normally, such a connection must be based on a connecting factor common to the victim and the author of the damage or, if the liability of a third party as author is involved, a connecting factor common to the victim and the third party.

(4) Where there are two or more victims, the applicable law is determined separately for each of them.

Article 11

The law applicable to non-contractual obligations under Article 10 shall determine in particular

1. the conditions and extent of liability;
2. the grounds for exemption from liability, as well as any limitation and division of liability;
3. the existence and nature of damages for which there may be compensation;
4. the kinds and extent of compensation;
5. the extent to which the victim's rights to damages may be exercised by his heirs;
6. the persons who have suffered damage and may claim damages in their own right;
7. vicarious liability;
8. rules of prescription and limitation, including rules relating to commencement of a period of prescription or limitation, to interruption or suspension of such a period.

Article 12

Whatever the applicable law under Article 10, in determining liability account shall be taken of rules of safety and public order in force at the place and time of the event which caused the damage.

Article 13

Non-contractual liability resulting from an event other than one causing damage shall be governed by the law of the State in which such event occurred. However, if due to a connecting factor common to the parties involved, a predominant link exists with the law of another State, that law shall be applied.

Article 14

The provisions of Articles 10 to 13 shall not apply to the liability of States or other legal persons of public law, or to that of their organs or agents for acts involving public administration and done by them in the performance of their functions.

Article 15

(1) The law governing an obligation shall also determine requirements pertaining to its execution, the various ways in which it may be discharged and the consequences of non-execution.

(2) As regards the means of execution of an obligation, the law of the State where the execution takes place shall be taken into account.

Article 16

(1) Obligations between assignor and assignee of a debt shall be governed by the law applicable under Articles 2 to 8.

(2) The law governing the original debt determines whether the debt may be assigned; it also regulates the relations between assignee and debtor and the conditions under which the assignment may be invoked against the debtor and third parties.

Article 17

(1) A statutory assignment of a debt shall be governed by the law regulating the legal institution for which the assignment has been created.

(2) Nevertheless, the law governing the original debt shall determine whether the debt may be assigned,